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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 215.

THE STEAMSHIP "BAYONNE," HER ENGINES, &c.; JOHN EDWARD PAYNE, CLAIMANT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 20, 1893.

(15,263.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1895.

1 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Libellant & Appellee,
against
THE STEAMSHIP "BAYONNE," HER ENGINES, &C.; JOHN EDWARD PAYNE, Claimant & Appellant.

Statement.

This action was begun on the 5th day of December, 1891, by the filing of a libel in the United States district court for the southern district of New York.

There has been no change of parties.

The steamship was attached and stipulations for value and for costs were filed for the sum of $3,000 and $250 respectively.

The trial was held on the 6th day of December, 1892, before the Honorable Addison Brown, judge.

No question was referred to a commissioner.

The final decree was entered on December 21st, 1892, and the notice of appeal filed on December 31st, 1892.

Exhibits A and B have been deposited with the marshal, pursuant to rule 33 of the United States Supreme Court.

2 District Court of the United States for the Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE STEAMSHIP "BAYONNE," HER ENGINES, TACKLE, APPAREL, FURNITURE, ETC.

Of December term, in the year of our Lord one thousand eight hundred and ninety-one.

Before Hon. Addison Brown, district judge.

On this 5th day of December, 1891, comes Edward Mitchell, attorney of the United States for the southern district of New York, and files this libel of the United States in a cause civil and maritime for penalty against the steamship "Bayonne," her engines, tackle, apparel, and furniture, being now within said district and within the admiralty and maritime jurisdiction of this court, and alleges and articulately propounds as follows:

That heretofore, to wit, on or about the 16th day of September, 1891, the said steamship "Bayonne" passed through Gedney's channel, in the harbor of New York, outward bound, and

3 while passing through said Gedney's channel the said steamship "Bayonne" then and there dumped, placed, discharged, and deposited a quantity of ashes into the tidal waters of the harbor of New York—that is to say, into the waters of Gedney's channel.

That the place where the said ashes were so dumped, placed, dis-

charged, and deposited was a place within the tidal waters of the harbor of New York and within the limits prescribed by the supervisor of the harbor of New York as the place where the deposit of all dredgings, stone, earth, sand, mud, cellar dirt, and other substances not garbage must not take place, which limits include all points and places in the tidal waters of the harbor of New York and its adjacent and tributory waters and Long Island sound, except to the south and east of a certain white-spar buoy known as the "Mud buoy," which buoy is three miles south of Coney island and located as follows:

Stone beacon light bearing west ¾ south, distant 4½ miles.

West Brighton observatory bearing northwest by south ½ north, distant 3½ miles.

Sandy Hook light-house bearing southwest, distant 6 miles.

Scotland light-ship bearing south ½ west, distant 6¼ miles.

Sandy Hook light bearing south-southwest, distant 7¾ miles.

4 Against the form of the statute of the said United States in such case made and provided—that is to say, in violation of the act of Congress approved June 29, 1888, entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York city, by dumping or otherwise, and to punish and prevent such offenses," and the rules and regulations made and prescribed by the supervisor of the harbor of New York pursuant to said act of Congress.

Whereby and by force of the statute of the said United States in such case provided the said steamship "Bayonne" became and is liable to a penalty of two thousand five hundred dollars, and became and is liable to be seized and proceeded against summarily by libel to recover the same in this court.

And the said attorney of the United States in behalf of the United States saith that all and singular the premises are true and with the admiralty and maritime jurisdiction of this court.

Wherefore he prays that process in due form according to the course of this honorable court in causes of admiralty and maritime jurisdiction may issue against such steamship "Bayonne," and that any persons claiming any right in said steamship "Bayonne" may be cited to appear and answer all and singular the matters aforesaid, and that for the causes aforesaid this court may be pleased to decree that the penalty aforesaid is a lien on the said steamship "Bayonne," her engines, tackle, apparel, furniture, etc., and that the said steamship, her engines, tackle, apparel, and furniture, may be condemned and sold to satisfy said decree and the lien

5 aforesaid and the costs herein, and for such other and further relief in the premises as to the court shall seem just.

EDW'D MITCHELL,
United States Attorney.

(Endorsed: Libel. Filed Dec. 5, 1891.)

6 SOUTHERN DISTRICT OF NEW YORK, *ss.*:

[L. S.] The President of the United States of America to the marshal of the southern district of New York, Greeting:

Whereas a libel hath been filed in the district court of the United States for the southern district of New York on the 5th day of December, in the year of our Lord one thousand eight hundred and ninety-three, by Edward Mitchell, Esquire, U. S. district attorney, on behalf of the United States of America against The Steamship "Bayonne," her engines, &c.;

Penalty under act of June 29, 1888, $2,500;

For the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamship may be cited in general and special to answer the premises, and, all proceedings being had that the said steamship may for the causes in the said libel mentioned be condemned as forfeited to the use of the United States:

You are therefore hereby commanded to attach the said steamship and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel that they be and appear before the said court to be held in and for the southern district of New York on the 22nd day of December, 1891, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf; and what you shall have done on the premises do you then and there make return thereof, together with this writ.

Witness the Honorable Addison Brown, judge of the said court, at the city of New York, in the southern district of New York, this 5th day of December, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and seventeenth.

SAM'L H. LYMAN, *Clerk.*

EDWARD MITCHELL,
U. S. District Attorney.

[Endorsed:] Vol. 37, page 401. Southern dist. of New York, United States district court. The United States *vs.* The St'ship "Bayonne," her engines, &c. Monition, ret'ble Dec'r 22nd, 1891. Edward Mitchell, U. S. attorney. Filed the 22 day of Dec., 1891. I hereby depute George H. Brockmeyer to execute the within writ. John W. Jacobus, U. S. marshal. Dec. 4th, 1891.

[Endorsed:] In obedience to the within monition I attached the steamship Bayonne, her engines, &c., therein described on the 4th day of December, 1891. John W. Jacobus, U. S. marshal. Dated Dec. 22, 1891.

7 At a stated term of the district court of the United States of America for the southern district of New York held at the United States court-rooms, in the city of New York, on Saturday, the 5th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable Addison Brown, district judge.

THE STEAMSHIP "BAYONNE," HER ENGINES, &C.; JOHN EDWARD PAYNE, Claimant,
asm.
THE UNITED STATES OF AMERICA, Libellant.

And now John Edward Payne, of Graves End, England, master of the steamship Bayonne, intervening for the interest of Bayonne Steamship Co., Ltd., of London, England, owner of said steamship, in the said steamship, appears before the honorable court and makes claim to the said steamship, &c., as the same are attached by the marshal under process of this court at the instance of the United States of America, and the said John Edward Payne avers that he was in possession of the said steamship at the time of the attachment thereof, and that the persons above named are true and *bona fide* owners of the said steamship, and that no other person is the owner thereof. Wherefore he prays to defend accordingly as master and lawful bailee thereof.

J. E. PAYNE, *Master.*

Sworn to and subscribed this — day of ——, A. D. 189–, before me—

——,
U. S. Commissioner.

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:] Vol. 37, p. 401. United States district court for the southern district of New York. The Steamship "Bayonne," J. E. Payne, cl't, *asm.* The United States. Convers & Kirlin, proctors for claimant. Claim of owner-. Filed the 5th day of Dec., 1891.

SOUTHERN DISTRICT OF N. Y.:

John Edward Payne, being duly sworn, deposes and says that he resides at Graves End, England, and that he is the master and agent of the owners of the above-named steamer, which is a corporation organized under the laws of Great Britain, and that the deponent is duly authorized to put in this claim on behalf of the said owner-, and that it is true to the knowledge of the deponent.

J. E. PAYNE.

Sworn to before me this 5th Dec., 1891.

THOS. ALEXANDER,
U. S. Comm'r.

8 Claimant's and respondent's costs.

District Court of the United States for the Southern District of New York.

Filed and recorded the 5th day of Dec., 1891.

Stipulation.

Entered into pursuant to the rules and practices of this court.

Whereas a libel was filed in this court on the 5th day of Dec., in the year of our Lord one thousand eight hundred and ninety-one, by the United States of America against the S. S. Bayonne, her engines, &c., for the reasons and causes in the said libel mentioned, and praying that said steamship be condemned & sold, and the parties hereto hereby consenting *and* that in case of default or contumacy on the part of the claimant or his sureties execution for the sum of two hundred fifty dollars may issue against their goods, chattels, and lands;

And whereas also a claim has been filed in said cause by John Edw. Payne, as master:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred fifty dollars, conditioned that the claimant above named shall pay all costs and expenses which shall be awarded against him by the final decree of this court or upon appeal by the appellate court.

J. E. PAYNE, *Master.*
GUSTAV HEYE.
PHIL. H. E. RUPRECHT.

Taken and acknowledged this 5th day of Dec., 1891, before me—

THOS. ALEXANDER,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Gustav Heye & Phil. H. E. Ruprecht, parties to the above stipulation, being duly sworn, doth depose and say that *he* resides in the city of New York; that *he is* worth the sum of five hundred dollars over and above all *his* just debts and liabilities.

GUSTAV HEYE.
PHIL. H. E. RUPRECHT.

Sworn to this 5th day of Dec., 1891, before me—

THOS. ALEXANDER,
U. S. Commissioner.

9 District Court of the United States for the Southern District of New York. In Admiralty.

Filed and recorded the 5th day of Dec., 1891.

Stipulation for Value.

Entered into pursuant to the rules and practices of this court.

Whereas a libel was filed on the 5th day of December, in the year of our Lord one thousand eight hundred and ninety-one, by United States of America against the S. S. Bayonne, her engines, &c., for the reasons and causes in the said libel mentioned; and whereas the said steamship is in the custody of the marshal under the process of attachment issued in pursuance of the prayer of the said libel; and whereas a claim to said steamship Bayonne, her engines, &c., has been filed by John Edw. Payne, as master, and the value thereof having been fixed by consent for the purpose of this action at $3,000, as appears from said consent now on file in said court, and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or his suret- execution for the above amountmay issue against their goods, chattels, and lands:

Now, therefore, the condition of the stipulation is such that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Convers & Kirlin, Esquires, proctors for the claimant of said steamship, abide by and pay the money awarded by the final decree rendered by the court of the appellate court, if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

J. E. PAYNE, *Master.*
GUSTAV HEYE.
PHILIP H. E. RUPRECHT.

Taken and acknowledged this 5th day of Dec., 1891, before me—
THOS. ALEXANDER,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Gustave Heye and Philip H. E. Ruprecht, parties to the above stipulation, being duly sworn, deposes and says, each for himself, that he resides in the city of New York, district of New York; that he is worth the sum of six thousand dollars over and above all his just debts and liabilities.

GUSTAVE HEYE.
PHILIP H. E. RUPRECHT.

Sworn to this 5th day of December, 1891, before me—
THOS. ALEXANDER,
U. S. Commissioner.

Approved, N. Y., Dec. 5, 1891.
ADDISON BROWN,
U. S. Dist. Judge.

It is stipulated and agreed that the value of the st'ship Bayonne for the purpose of this stipulation be the sum of three thousand dollars.

EDW'D MITCHELL, *U. S. Att'y.*

N. Y., Dec. 5, 1891.

10 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of John Edward Payne, claimant of the steamship "Bayonne," to the libel of the United States against said steamship, her engines, tackle, apparel, and furniture, in a cause for penalty, alleges and articulately propounds as follows:

First. The claimant admits that on or about the 16th day of September, 1891, the said steamship "Bayonne" passed through Gedney's channel, in the harbor of New York, outward bound, but upon information and belief denies that while passing through Gedney's channel the said steamship Bayonne then and there dumped, placed, and discharged a quantity of ashes into the tidal waters of the harbor of New York—that is to say, into the waters of Gedney's channel.

Second. The claimant admits that a small quantity of ashes was discharged from said steamship "Bayonne" on the day mentioned, but denies that the place where the said ashes were discharged, placed, and deposited was a place in the tidal waters of the harbor of New York and within the limits prescribed by the supervisor of the harbor of New York as the place where the deposit of all dredgings, stone, earth, sand, mud, cellar dirt, and other sub-

11 stance not garbage is prohibited, which limits include all points and places in the tidal waters of the harbor of New York and its adjacent and tributary waters and Long Island sound, as set forth in the libel, and explains that the ashes discharged from the steamer were discharged to the south and east of the said described limits.

Third. The claimant denies that the discharge of the ashes from said steamship "Bayonne" as above set forth was against the form of the statute of the United States in such case made and provided—that is to say, in violation of the act of Congress approved June 29th, 1888, entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York city, by dumping or otherwise, and to punish and prevent such offenses"—and the rules and regulations made and prescribed by the supervisor of the harbor of New York pursuant to said act of Congress.

Fourth. Claimant denies that by force of the statute of the United States in said case provided said steamship "Bayonne" by reason of the premises became and is liable to a penalty of $2,500 and became and is liable to be seized and proceeded against summarily by libel to recover the same or any part thereof in this court.

Fifth. The claimant denies that all and singular the premises in said libel are true, and upon the grounds hereinafter set

12 forth denies the jurisdiction of this honorable court.

Sixth. For a separate and further defense claimant avers

that said steamship "Bayonne" had no notice of the limits prescribed by the supervisor of the harbor of New York within which the discharge of ashes is prohibited.

Seventh. For a further and separate defense the claimant avers that said steamship "Bayonne" is a British steamship and at the time and place mentioned in the libel was being used and employed as a common carrier of merchandise and was not being used and employed in violating any provision of the said act, to wit, an act of Congress approved June 20th, 1888, entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York city, by dumping or otherwise, and to punish and prevent such offenses," and that accordingly said steamship is not liable *in rem* for the penalty prescribed by said act, even though it should be found that ashes were discharged from said steamship by an individual or individuals without the authority of the owners or master of said steamship within the limits prescribed by the supervisor of the harbor of New York as the place where the discharge of ashes is prohibited.

Wherefore the claimant prays that said libel may be dismissed with costs, and for such other relief in the premises as to the court shall seem just.

13 SOUTHERN DISTRICT OF NEW YORK, *ss.:*

J. P. Kirlin, being duly sworn, says that he is one of the proctors for the claimant herein, and that according to his information and belief, derived from the claimant, the foregoing answer is true. He further says that the reason why this answer is not verified by the claimant is that the claimant is outside the jurisdiction of the United States, and, as deponent is informed, is on a voyage at sea.

J. P. KIRLIN.

Sworn to before me this 2nd day of February, 1892.

GEORGE A. BAKER,

[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed: Answer. Filed Feb'y 2, 1892.)

14 *Libelant's Depositions.*

Deposition of Jabez C. Norton, taken *de bene esse* at New York, July 7th, 1892, before Samuel H. Lyman, Esq., United States commissioner.

JABEZ C. NORTON, being duly sworn, testified as follows:

Direct examination by Mr. EVARTS:

Q. What is your business, Mr. Norton?
A. I am a shipmaster—seaman.
Q. Do you expect to go to sea shortly?
A. I do, sir.
Q. When?

A. I do not know. I am waiting for my ship.

Q. Expect to go next week?

A. I do; yes, sir.

Q. What was your business on the 16th of September, 1891?

A. I had charge of this dredging steamer, Reliance; digging out Gedney's channel at that time.

Q. And were you at work dredging on the morning of the 16th?

A. Yes, sir.

Q. How early did you begin there?

A. Began at daylight—about half past four—quarter to five.

Chart marked for indentication Exhibit A of this date.

Q. (Handing chart to witness.) Will you please make on this map, Exhibit A, the place where you dumped your load after you had dredged it?

A. (Witness marks point with letter X.)

Q. Will you just describe that locality?

A. That locality is about a mile and a half or two miles east-southeast of the Scotland light-ship.

Q. And you always dumped your load you got in Gedney's channel about that place?

15 A. Yes, sir; we dumped about in that place. We had to go in eighty feet of water to dump.

Q. On the morning of the 16th did you see the vessel "Bayonne" going out to sea?

A. I did, sir.

Q. Were you at the time when you first saw her at anchor, dredging?

A. No, sir; I was coming in. I dumped one load—gone down and emptied one load and was coming back to dredge another load.

Q. What was your course on your return from where you dumped this matter to the place where you were dredging?

A. North-northwest by compass.

Q. And will you please mark on that map the spot where you were when you first saw the vessel Bayonne dumping ashes? Make the letter A.

A. (Witness marks with red pencil the letter A.)

Q. Now, will you please mark on that map by the letter B where the vessel Bayonne was when you first saw her dumping?

A. (Witness marks with blue pencil the letter B.)

Q. You saw her over what bow?

A. On our port bow. She was going out south-southeast in charge of the pilot, and I was going in west-northwest.

Q. Will you please state what you saw being done in the way of dumping the ashes?

A. I was in my pilot-house with my quartermaster, and the Government inspector was out on the bridge, and he says, "Captain Norton, they are dumping the ashes from the tramp," and I saw them dumping from his port side aft.

Q. How many people were engaged in dumping ashes?

A. Two.

Q. How were they doing it?

A. With a shovel. The ashes were piled on the deck close to the rail on this side (indicating).

16 Q. Did you hail the vessel at all?

A. I did; yes, sir.

Q. How long a time was it from the time you first saw her dumping ashes until you hailed her?

A. It was about six minutes.

Q. Was she all that time shoveling ashes off of the ship?

A. Yes, sir.

Q. What did you say?

A. I says, "Stop throwing those ashes overboard"

Q. What did they say in return?

A. Made no reply whatever; the men stopped shoveling and the men leaned on their shovels and laughed—the sailors.

Q. Did you see this vessel take off her pilot?

A. Yes; saw her stop.

Q. Did this vessel take her pilot off before or after you hailed her?

A. After I hailed her.

Q. How long after?

A. It was right immediately after I hailed her, because she was then nearly down—the pilot-boat lay at anchor right outside of this buoy, where he always lied.

Q. You are sure that the pilot was not discharged until after you had hailed the vessel?

A. Yes, sir.

Q. And until after they had been shoveling ashes off, to your knowledge, four or five or six minutes?

A. Yes, sir; four or five or six minutes; I couldn't tell exactly; it was five minutes sure. I had my ship to look out for when I saw them dumping the ashes, and three men were on the bridge, the pilot and captain of the ship and some one else, the quartermaster, I suppose; three of them on the bridge.

Q. Will you please state the limits within which it is permitted to dump.

A. (Indicating.) The city scows dump outside of and between those two white buoys that we have nothing to do with; the

17 limits here are from Scotland light-ship south-southeast or west-northwest.

(The witness draws a blue line on the chart, and says, "They are not allowed to dump anywhere from New York city or from these channels inside of that line.")

Q. And was this place where you saw the Bayonne dumping ashes a place where it was prohibited to dump ashes by the statute?

A. Certainly; it was in the shoalest part of Gedney's channel where she was dumping her ashes, and I made the remark to the Government inspector at the time——

Q. This dumping which you saw done from the Bayonne was done in a place which was prohibited by the statute?

A. Certainly; yes, sir.

Cross-examination by Mr. KIRLIN:

Q. Is your boat a digger or dumper?

A. She is a digger and dumper, both; we *did* with a pump on both sides and then load her full and open our valves.

Q. How long does it take to gather up a load?

A. In the Gedney's channel we would load up in 45 to 60 minutes, according to the state of the tide.

Q. Then you must have had a load on that morning about half past five?

A. I had a load on and had gone down.

Q. You had a load at half past five?

A. Yes; quarter past five.

Q. How long did it take you to go from where you took your load till you dumped it (indicating the point marked with the letter A)?

A. It took going down twenty to twenty-five minutes, according to the tide.

Q. How long did it take you to dump?

A. Took us about twelve minutes to dump our load and wash out.

Q. And about the same length of time to go back?

A. About eighteen to twenty minutes going back; yes, sir.

Q. Were you on the north or south side of the channel
18 when you first saw the Bayonne?

A. I was in about the middle of the channel, a little northerly of the two.

Q. Did she pass your bow or under your stern?

A. We passed each other on the port side; she was coming out east-southeast and I was coming in west-northwest.

Q. (Indicating the point on chart.) Is that meant to be the letter X?

A. Yes, sir; that is where I dumped my load.

Q. What did you *saw* your course was?

A. About west-northwest; that used to run me in the fog up to the buoy No. 1. I used to run for that.

Q. Is the Perch and Ball buoy there?

A. That is the Fairway buoy; yes, sir.

Q. Haven't you drawn that blue line too far to the eastward?

A. I do not think so; it may possibly be; we are not allowed to dump inside of that Whistling buoy.

Q. The regulations say that you are entitled to dump at any place east and south of the Mud buoy. A line east and south of the Mud buoy would be about an inch or inch and a quarter to the westward of the two lines you have drawn, wouldn't it?

A. I do not think so; possibly they might, but we are not allowed inside of the Whistling buoy.

Q. There is nothing in the regulations about the Whistling buoy, is there?

A. No, sir; Sandy Hook must bear southwest six miles.

Q. But the other regulation is also true—that is, that you can dump anywhere east of a line south of the Mud buoy?

A. East of a line?

Q. That would almost pass through the Whistling buoy?

A. They are not allowed to dump that side of the Whistling buoy.

Q. Doesn't that line pass through?

A. Yes; just about.

Q. You have drawn your line a mile or two east of it?

19 Mr. EVARTS: Cannot you tell that line from these other papers?

The WITNESS: Yes, sir; I can as near as I can get to it without parallel rules. I am a little too far eastward.

(The witness draws a line in red and blue pencil.)

By Mr. EVARTS:

Q. The regulations do not permit you to dump inside of that line?

A. No, sir.

Q. The last line which you have drawn—the red line?

A. Yes, sir; the red line.

By Mr. KIRLIN:

Q. You weren't digging at the time you saw him or at the time you hailed him?

A. No; I was going in to commence digging again; the tide was running flood.

Q. Did you come to an anchor before you spoke?

A. No, sir; we don't anchor at all.

Q. Did you begin to dig?

A. No, sir; I went up and turned around and commenced digging from the upper buoy down.

Q. How far is it from Sandy Hook out to the place where you first saw the Bayonne?

A. It is about three miles and a half, sir, from the beacon light; about four miles from the Sandy Hook light.

Q. That is where he was when you first saw him?

A. Yes, sir; three miles and a half; that is in the channel; in a straight line it would be nearer.

Q. And you say the pilot was still on board when you hailed her?

A. Yes, sir; pilot was on the bridge.

Q. Which side did the pilot leave the ship from?

A. On the starboard side, sir.

Q. Mark on the chart with the letter P between which
20 buoys the pilot left the ship.

A. (Indicating.) That is where she lay at anchor—the pilot-boat; she anchors there summer and winter.

Q. That is a little south by east of "Gedney No. 2"?
A. Yes, sir.
Q. How far was you away from him when you hailed him?
A. About three hundred feet, sir; two hundred and fifty to three hundred feet; not to exceed three hundred.
Q. What kind of morning was it?
A. Fine morning; smooth, clear.
Q. You say the men laughed when they stopped and leaned on their shovels?
A. Yes, sir; leaned on their shovels and laughed or smiled.
Q. Isn't it possible that they may have been weeping?
A. No; I do not think they were weeping. They were English sailors.
Q. Can you tell three hundred feet away from your steamship whether a man is weeping or laughing?
A. Yes, sir; I can.
Q. The men had been shoveling?
A. Yes, sir.
Q. Keeping a little stream running?
A. Just running it over the side. The ashes were piled up three or four feet from the ship's side.
Q. Which way was the wind that morning?
A. I cannot recollect which way the wind was, if any.
Q. Was there any tide?
A. Yes, sir; flood tide.
Q. What direction?
A. My log book is down on board of the steamer, and she is at Tottenville; but very little wind; calm wind.
Q. Don't you think you might be mistaken, and this vessel was outside of the Perch and Ball buoy?
A. No, sir; I never go outside of that.
Q. And that is why you think so?
A. Quite positive of it. I see the Perch and Ball buoy on my
21 starboard beam. I steer this one course, and I had to go into the fog just as I did any other time, and I never went outside.
Q. Have you read the depositions of the witnesses that were taken from the Bayonne?
A. Yes, sir; glanced them over this morning.
Q. Did you notice that three or four witnesses stated that the pilot had been gone from the ship twenty minutes?
A. I did.
Q. That is wrong, is it?
A. That is wrong; yes, sir. The pilot was on the bridge when I hailed him.
Q. Do you know the pilot?
A. No, sir; I do not.
Q. Have you seen him about this matter at all?
A. No.
Q. What time in the morning was it when you first saw the Bayonne?

A. It was about seven o'clock; in the neighborhood of seven o'clock.

Q. What time was it when the pilot left the ship?

A. It was about five minutes after seven.

Q. How long would it take the Bayonne to run, at the rate she was going, from where she was to the Sandy Hook light-ship?

A. I should think it would take her about thirty minutes, sir—twenty-eight minutes or thirty.

Q. How far is that from where she was when she took the ashes?

A. About four and a half miles, I presume. She was going about nine knots against the tide.

Q. Is the Sandy Hook light-ship now situated at the place shown on the chart?

A. No, sir; Sandy Hook light-ship is to the northward and eastward.

Q. It is on a line about north and on a continuation of the line out from Gedney's channel?

A. Yes, sir. She is put on a range with Gedney's channel and the Fairway buoy about two miles.

22 Q. Mark approximately where she is with a blue pencil.

The witness marks with a blue pencil the letters L. S., and says, "She lies about there."

Deposition of Frank C. Warner, taken *de bene esse* before Samuel H. Lyman, U. S. commissioner, at his office, in the post-office building, New York city, July 15th, 1892.

FRANK C. WARNER, being duly sworn, testified as follows:

Direct examination by Mr. EVARTS:

Q. What is your business, Mr. Warner?

A. In the employ of the Government at Sandy Hook at present.

Q. Were you in the employ of the Government on the 16th of last September?

A. Yes.

Q. What was your business at that time?

A. I was inspector of the dredging steamer Reliance.

Q. How long a time had you been inspector on board this vessel?

A. I had been on board her nearly two years.

Q. Where had she been dredging just prior to and for how long a time prior to the 16th?

A. She had been dredging in different places; she had been dredging for a week in Gedney's channel; previous to that in the Main ship.

Q. In Gedney's channel she had been dredging for a number of weeks?

A. Yes.

Q. Were you on board of her all that time?

A. Yes, sir.

Q. Where was it your custom to take your load that you dredged?

A. Southeast of the Scotland lightship; in not less than 14 fathoms of water.

Q. Is this it, about—where this letter X is marked (indicating)?

A. Yes; we used to sound with a lead line until we struck
23 14 fathoms, and we had ranges on shore, and we would always run out until those ranges were on and dump.

Q. Where you dumped is about where the letter X is marked on Exhibit A of July 7th?

A. Yes, sir.

Q. Do you remember what time of day you saw this vessel, the Bayonne?

A. It was 7.05.

Q. On the 16th?

A. On the 16th; in the morning.

Q. Had you been dredging any before that?

A. I had been out with a load.

Q. Had you just returned?

A. Just returned, and I think were dredging at the time.

Q. And were you dredging at the time you first saw the Bayonne dumping ashes—shoveling ashes overboard?

A. I think we were, but if the tide was flood possibly we were not, because if the tide was flood we would run up to G 1 and turn around and dredge toward or against the tide; if the tide was flood at that time we were not dredging, probably.

Q. Will you please mark on this map with this pencil (handing witness Exhibit A) whereabouts your vessel was at the time you first saw the Bayonne shoveling ashes overboard?

A. We were about 1,500 feet east of G 2.

Q. Mark with the letter Z just about where you were.

(The witness marks on chart with a red pencil the letter Z, and says, "I think that is about 1,500 feet on this scale.")

Q. Will you also mark where you first saw the Bayonne when you first saw her dumping ashes?

A. She was about opposite G 2, between G 2 and G 1, when I first saw the ashes going overboard.

24 Q. Mark with the letter R.

(The witness marks the letter R on the chart.)

Q. How long a time was it from the time you first saw her shoveling ashes overboard until you hailed her?

A. She was running very slow to run alongside the rowboat to take the pilot off, and it couldn't have been five minutes.

Q. The shoveling of the ashes was continuous from the time when you first saw her until you hailed her?

A. It was continuous until she stopped to let the pilot off, and the men stopped shoveling and went to the starboard side to see the pilot off.

Q. Left the shoveling of the ashes?

A. Left the shoveling and resumed their shoveling when the pilot had left.

Q. And was it after they had resumed their shoveling that you shouted to them?

A. It was just as the vessel started to go on; that is my impression, just as she started to go on.

Q. How near was the vessel to you at the time you hailed them?

A. Four hundred feet, I believe I stated in my affidavit; it is my impression it was about four hundred feet, estimated, of course, on the water.

Q. What was it you said to them when you hailed them?

A. Stop dumping ashes—throwing ashes.

Q. What did they say to you?

A. They made no reply, but the officers on the bridge looked around.

Q. Did they say anything to you of any kind—anybody?

A. No, sir.

Q. Did they stop shoveling ashes overboard?

A. They stopped and leaned on their shovels; they stopped and resumed shoveling.

25 Q. After you hailed them; so that even after you hailed them they dumped the ashes within prohibited limits? Will you please mark on that map the line within which it is prohibited to dump ashes?

A. The line is fixed by the latitude and longitude given in the act prohibiting dumping. I do not remember just what that is, but the north and south line passes very near the Whistling buoy.

Q. Is the line just about the same, in your judgment, as the red-pencil line on this map extending north and south?

A. Yes, sir; the exact line can be obtained from the supervisor of the harbor; the exact latitude and longitude within which dumping is prohibited.

Q. Is the whole of Gedney's channel within the limits where it is prohibited to dump ashes?

A. Yes, sir; the line of shoal water extends out 3,700 feet from G 2 along the channel and there it drops off into deep water, or what I call deep, forty or fifty feet, and we dredge out to that point and that is five or six hundred feet inside of the Fairway buoy.

By Mr. KIRLIN:

Q. Is the Fairway buoy and the Whistling buoy the same thing?

A. No, sir; the Fairway buoy is about half way between the Whistling buoy and the mouth of Gedney's channel. It is put down here as the Perch and Ball buoy; a black and white striped buoy, called the Fairway buoy.

By Mr. EVARTS:

Q. Whereabouts is the pilot-boat usually anchored?

A. She is always anchored just south of the channel, in about 1,000 or 1,500 — from G 1.

Q. Was it after you first saw the ashes being shoveled over
26 the side of the Bayonne that you saw the rowboat come out from the pilot-boat to the Bayonne?

A. The rowboat usually meets the pilot-boat some ten or fifteen minutes before the ship gets there, and they lay around waiting for a favorable time to run alongside, and she had probably been up there five or six or ten minutes.

Q. Did you see the rowboat from the pilot-boat run alongside of the Bayonne after you first saw the ashes shoveled over the side of the Bayonne?

A. Yes, sir.

Cross-examination by Mr. KIRLIN:

Q. You are quite sure that they shoveled over ashes before the pilot was dropped, are you?

A. Yes, sir; I saw them shoveling over ashes when she was opposite G 1 and G 2.

Q. You said the pilot-boat was about opposite G 1?

A. From 1,000 to 1,500 feet east of G 1.

Q. Where from G 2?

A. G 1 and G 2 are on opposite sides of the channel; G 1 is the black on the south side, G 2 is the red on the north side, of the channel.

Q. Where were they when you hailed them, just?

A. They were opposite the pilot-boat, about 1,500 east of G 1 or G 2.

Q. And you say they resumed shoveling over ashes after they heard you hail?

A. Yes, sir.

Q. How long did they continue shoveling over ashes?

A. They continued as they went to sea.

Q. All the way out to the edge of the channel?

A. Yes; all the way out to the edge of the channel, because the channel ended—that is, they would reach deep water in five or six minutes; something like that.

Q. They didn't cross the limits in five or six minutes?

A. Not to the Whistling buoy.

27 Q. Did they continue the shoveling over of ashes as far as you could see them going out?

A. Yes, sir.

Q. After you hailed them?

A. Yes, sir.

Q. Quite sure of that, are you?

A. Yes, sir; I know it.

Q. Do you know Mr. J. C. Norton?

A. Yes, sir.

Q. He was on the boat that morning, was he?

A. Yes, sir.

Q. Have you had any conversation with him about the circumstances of the throwing over ashes from this vessel?

A. I haven't seen him since the dredging operation stopped, the middle of last October.

Q. Is he your superior on the boat or are you his superior?

A. I am his superior.

Q. What are your duties on the boat?

A. To see that the dredging is carried on in the proper place. The Government only pays for material taken out where the specifications say it shall be. We work from the chart furnished by the army officers.

Q. Where were you standing as your boat came back from the position marked X where you dumped your previous load?

A. I was standing on the deck somewhere near the bridge.

Q. Had your vessel crossed to the upper side of Gedney's channel when you crossed the boat?

A. We were on the north side of Gedney's channel.

Q. Heading which way?

A. Westward—that is, up Gedney's channel.

Q. Heading towards the steamer?

A. Yes, sir.

Q. Which way did she bear from you, about?

A. About southeast—that is, about the line of the channel; west-northwest ⅞ west is the course of the channel, and she was headed out; that would be the opposite way.

28 Q. Which way was she bearing from your vessel as you looked at her?

A. She was on our port bow.

Q. About how many points?

A. Well, the channel is 1,000 feet wide, and we were running up and she was running down.

Q. About a point or two?

A. Yes, sir.

Q. How far was she when you first saw her throwing ashes overboard?

A. About 1,500.

Q. And then she ran about 1,500 till she came to the pilot-boat, during which time she threw off ashes?

A. The engines were stopped.

Q. Is that right? Did she continue to throw off until they got to the pilot-boat?

A. Yes, sir.

Q. Then you hailed her and then they stopped and then resumed putting ashes overboard and continued as far as you could see?

A. They stopped shoveling and went over to see the pilot off and then resumed the shoveling.

Q. Did you see them smile when they shoveled?

A. I do not know; a distance of 500 feet, I wouldn't know whether they smiled or not.

Q. Mr. Norton said they weren't dredging at the time you first saw the Bayonne. Is that right?

A. I am under the impression that we were dredging, but if it

was flood tide we were not. If it was flood tide we would run up to G 1, turn around and dredge against the tide.

Q. If you were dredging you wouldn't have been as far north of the channel as you say you were when you first saw her?

A. Yes, sir; we were dredging from G 1 3,700 feet eastward.

Q. Weren't you more to the northward of the channel when you first saw her?

A. No, sir; we were right in the channel.

Q. How wide is the channel there?

A. A thousand feet wide. We were dredging on the north
29 half of the channel, the shoal running from G 2 3,700 feet eastward toward the Perch and Ball buoy.

Q. Do you remember what your course was from the dumping ground back up the channel—compass course?

A. We always headed just straight for the work. I do not know just what that course would be; it was the captain's business to navigate the vessel. I didn't have anything to do with that.

Q. You sometimes would go out further than that X point to dump?

A. Very seldom, because we had ranges on shore; we had soundings.

Q. Then you would have ranges?

A. From the Scotland light-ship to Sandy Hook.

Q. That was only to get your position northward and southward on the course; these ranges wouldn't tell you how far out to sea it was?

A. No, sir; there is a large area there to dump; running six loads a day out, of course we didn't pay very particular attention about getting to the exact spot.

Q. How are you able to fix that time, 7.05 a. m., when you first saw the Bayonne?

A. I looked at my watch at the time.

Q. Do you always look at your watch when you see a boat coming out of the channel?

A. When I see them dumping ashes I do.

Q. Make a note of it?

A. Yes, sir; I have specific written orders to do so.

Q. Do you remember how the tide was that morning?

A. I do not.

Q. How many men were shoveling ashes?

A. Two.

30 Q. Are you certain that the men were shoveling when you hailed?

A. They stopped shoveling and looked over at us.

Q. You say they stopped shoveling to let the pilot off?

A. They resumed shoveling and we hailed them just about the time they recommenced.

Q. Did they stop again?

A. They stopped when we hailed them.

Q. How long did they stop?

A. Half a minute or so.

Q. And they went right ahead?
A. Went right on.
Q. Have you seen the deposition that the ship officers have respecting this matter?
A. Yes, sir.
Q. Who gave you instructions to make a note of these things?
A. Colonel Gillespie.
Q. What is his position?
A. He is in charge of this district, the river and harbor.
Q. Where is his headquarters?
A. Room 61 Army building, Whitehall street.
Q. You are very positive ashes were shoveled over before the pilot-boat left the ship?
A. Yes.
Q. For five minutes?
A. Yes, sir.
Q. Are you as sure of that as anything else you have testified to?
A. I know it; I know it to be a fact.

31 *Claimant's Depositions.*

Depositions taken *de bene esse* pursuant to notice April 10th, 1892, at the city of Philadelphia, before C. H. Guilbert, notary public.

Present: Robert Ralston, Esq., assistant U. S. district attorney, for the Government; Messrs. Convers and Kirlin (Mr. Kirlin), for respondent.

JOHN EDWARD PAYNE, having been duly sworn, deposes and says:

I am fifty-one years of age. I reside at Gravesend, England. I am a master mariner. On the 16th of September, 1891, I was in command of the steamship "Bayonne." I had been in command of her at that time about two years. I have been going to sea and been in command of steamships five years. Prior to that time I had been master of sailing vessels for thirty-five years. I have been going to New York two years and a half, during that time having made nineteen trips. The "Bayonne" is a British steamship, owned by the Anglo-American Oil Company of London. She is 2,154 tons register. She is a tank steamer and carries oil in bulk.

On the 19th of September, 1891, she was bound for a port in the United Kingdom with a full cargo of oil in bulk of refined petroleum. We got her under way about 5.55 in the morning from
32 New York. We were in command of a Sandy Hook pilot. We got down as far — the Hook at 6.45. The pilot left the ship a quarter of an hour after we left Sandy Hook. That would make it about seven o'clock. At that time we were making about ten and a half knots an hour. The ashes were put over, I should think, a quarter of an hour after the pilot left the ship; perhaps twenty minutes. At that time we were, I should think, at least

seven miles east of Sandy Hook (referring to chart). We must have been about six miles east of Sandy Hook. When the ashes were shovelled over I was, I should think, two miles east of the Perch and Ball buoy. It is commonly called the Fairway. I won't be sure whether it is the same, but we know it as the Fairway buoy.

Coming out through Gedney's channel, with reference to the Perch and Ball buoy and the Whistling buoy, I came out probably about east half south between the two buoys. That was after the pilot left the ship. I cannot give you any courses up to the time the pilot left the ship, because that does not concern me at all. The pilot is in full charge of the vessel.

When the pilot left we had the Perch and Ball buoy on the port bow less than a mile away. We passed the Whistling buoy before the ashes were put over. I was looking out for the Whistling buoy as I came along. I passed close to this Fairway buoy; so close I could have thrown a basket upon it. I was looking out for the Whistling buoy all the time. We had passed the Perch and Ball buoy, I suppose, ten minutes or a quarter of an hour before we put the ashes over. At the time the ashes were shovelled over I was hailed from a dredger. She was either a dredger or a mud-
33 carrier. She passed on the port side of us or to the northward of us, because I was on the bridge at the time.

I do not remember where I was with reference to the Sandy Hook light-vessel when we received that hail. We are always on the lookout. After we pass the Whistling buoy it is our next duty to look out for the Sandy Hook light-vessel. I was laying the usual course. We hadn't got to the Sandy Hook light when the ashes were put over. I don't remember which way we bore at that time.

By Mr. KIRLIN:

Q. Were there any standing orders on your vessel with reference to the time when the ashes were to be put overboard?

A. Yes, sir; I had given the chief officer positive instructions, and renewed the instructions every time we came to port, not on any account to dump ashes or to throw any rubbish or anything else overboard until the ship was something like an hour at sea—that is, counting the time the pilot left the ship.

At the time the scow hailed me and asked me what I was doing I was in the very act of telling the chief officer that I considered he was a little too soon in getting the ashes over, and immediately that the scow hailed me, thinking that I might have been in the wrong getting over so soon, although the pilot had left the ship and I considered I was out at sea, the dumping immediately stopped. I had it stopped immediately. My general orders were not even potato parings or anything or any refuse should be thrown over the side. It was all to be kept on board, and from the time we entered up to the time we left there was nothing ever thrown out of that
34 ship except on this occasion, and then having the pilot out of the ship from a quarter of an hour to twenty minutes I concluded, as most any one would, that the ship was finally away at sea and beyond all the marks. Although the chief officer, even

then, was not acting right up to my instructions, but at the same time I believe in my own mind if the scow had not hailed us I should have thought we were sufficiently to the eastward not to have interfered with the chief officer. I was telling him before the scow hailed us I thought he was a little too sharp.

Q. In other words, that he had disobeyed your instructions not to put them over until the pilot had been gone an hour?

A. Positively he disobeyed my instructions. The man would admit that if we had him here. They had only commenced to shovel the ashes over; I think fifteen or twenty shovels full; positively not that much.

By Mr. RALSTON:

Q. Did you see them throwing them over?

A. I was on the bridge at the time, and had charge of the vessel immediately after the pilot left. My attention was drawn from the bridge. I saw them being shoveled over. I could only guess at the time they had been shoveling them.

I called the mate on the bridge at the time, and I told him, "I think you are too soon getting these ashes overboard." I said, "I would wait a bit." Just then we received the hail from the scow.

35 By Mr. KIRLIN:

Q. Referring to this blank permit, form A of the War Department, on the back of which the limits are given outside of which the deposit of all dredgings or other refuse matter must be deposited, have you located the buoy on this chart with reference to these bearings?

A. Yes, sir.

(Witness marked with green pencil on chart with the letter "B" the buoy which the bearings given on the blank permit show to be the "Mud buoy.")

(Permit marked for identification "A, April 11, 1892, C. H. G.")

(Chart marked for identification "B, April 11, 1892, C. H. G.")

Q. Referring to the chart, where were you at the time that the ashes began to be put over with reference to a line extending south from the white buoy, marked B in green, east or west?

A. I considered I was two miles east of that position, and as I passed close around to what we term the Fairway buoy on an east half south course, it naturally follows, as I passed close to that buoy, that that was my position in nine and a quarter fathoms (indicating on chart). The latitude was 40 28 45; the longitude was 73 52 20.

(Witness marked position on chart with green pencil "X.")

I am sufficiently certain of my position at the time I received this hail or at the time the ashes begun to be put over to
36 swear that I was east of the land extending from the Mud buoy to Scotland light-vessel as much as two miles. I know it by the time the pilot left the ship.

I never received any notice or information of the limits outside of which ashes had to be put overboard on any voyage entering or leaving the port of New York.

On the 16th of September, 1891, my vessel was being employed for the purpose of carrying bulk petroleum to the United Kingdom, and for no other purpose. She was not engaged in towing any boat or scow containing refuse matter or dumpings of any description. She was never used as a dump-scow or a mud-scow. These ashes were not put overboard on the morning of the 16th at the time and place I have indicated with my authority.

Q. Were they or not put over by any authority of the owners of the vessel?

(Objected to.)

Q. Has anybody on board the vessel any authority except the authority that is derived from you to do acts in the navigation of that vessel?

(Objected to.)

A. It is usual that the executive officer exercises a large authority on board the ship. He gets that authority from me.

Q. Has he any authority outside of what he receives from you to do any act in connection with the navigation of the vessel?

(Objected to.)

37 A. Certainly not. I saw the ashes when they first began to put them over. I was on the Flying Bride at the time and had charge of the vessel. The time I received this hail and the dumping of the ashes was simultaneous. It was just a moment or two. It was only a minute or two. I do not think the man could have put over more than fifteen or twenty shovels full. The officer who was responsible for the putting over of the ashes on that morning was Harry Griffiths. He is not now in the ship. He was not in the ship at the time she was attached in this suit, December, 1891. I do not know where he is or where he has been since December. I do not know the names of the men who shoveled the ashes overboard. They have long since left the ship. I do not think they were in the ship when she was attached in December, 1891. I could not answer positively.

The vessel was attached only an hour or two before my departure on the voyage in December, 1891. She was attached just as I was going to leave that evening. I intended to sail that evening and the ship was attached in the afternoon.

I am now bound on a voyage to sea. I expect to sail next Wednesday night.

Cross-examination by Mr. RALSTON:

These men that threw the ashes over were regular members of my crew at that time. They were acting under the instructions of some officer. I got to Sandy Hook at seven o'clock. That was

when I passed the Hook. The exact position of dropping
38 the pilot I could not tell you. I know it is fixed upon my memory that the pilot was about a quarter of an hour or twenty minutes out of the ship when the ashes were dumped. I dropped the pilot on or about Sandy Hook. I could not say whether the Hook was a little east or west of the position. It was about fifteen or twenty minutes after that that this dumping occurred. At that time I reckoned that we were making about ten and a half knots an hour.

Q. Please indicate on this chart marked B the distance from Sandy Hook to the mark "X."

A. It is a little over six miles. We went out through Gedney channel. I do not mean to say we ran those six miles in fifteen minutes from the time we dropped the pilot until we got there.

Q. The dumping of the ashes must have occurred further west than that green mark?

A. From the position that I give as leaving the pilot, that is a twenty-minutes run. I did not time the twenty minutes.

Q. You did not take the time that it took you from the Hook to the time the pilot left you, only you say it was about twenty minutes?

A. That is all I can say; I cannot say any further. I did not take the time from the time the pilot left until the time this dumping began. I simply guessed at it; that is all. Getting the hail from the scow, it impressed itself more upon my mind than it would otherwise have done. I think she was a dredger. The dredger at that time was on our port bow, on the north side of the ship.

39 Q. Was that dredger at the time she hailed you between Gedney buoy No. 2 and Perch and Ball buoy, known as the Fairway buoy? Was she not between those two points?

A. No, sir; certainly not. We passed the Fairway buoy, and it was on our north side as I had the boats going out east. At the time the dredger hailed as I should say, as near as I can remember, she was where I have made these marks accidentally as illustrating.

(Witness marked on chart with green pencil "D" as the place where the dredges was at the time she hailed the ship.)

We were dumping ashes at the time she hailed us.

Q. You were dumping ashes considerably further west than the mark "X"?

A. I could not positively swear to that position. I know I am on my oath, and I will be careful to keep within the swearing, but I could not positively swear to it. I have an impression that is about the position. Beyond that I could not say. It is a very long time ago, and those things are apt to slip one's memory, and I have not got one of the best, unfortunately.

I would be a little surprised to see a dredger out there in seven or eight fathoms of water dredging, but I do not know whether she was dredging.

These ashes were on the port side under the lifeboat. They were

abaft the midships. They were piled up on the deck. I could see the pile from the bridge quite plainly. The bridge is forward of the mainmast.

40 I was in charge of the vessel myself at that time. I was watching out my course pretty well for the light-ship.

They could not have been dumping the ashes for some time without my having seen them. We keep our eyes pretty well about us all around. We can keep a good lookout ahead and lookout astern at the same time to watch for some of these fast fellows coming up, the "Teutonic," or something of that description behind us. A good lookout all around a vessel is the best lookout aboard a ship.

When this man on the dredger called to us he said, "What are you about?" I don't know whether there was any reply made to that. I don't think there was any reply made. I made none. That is sure. I am sure the pilot had left us before I was hailed. They had just commenced shoveling at the time we were hailed. I suppose fifteen or twenty shovels full would indicate the quantity that had been put overboard. I gave positive orders that no dumping should be done in the harbor. At this time I said to my first officer perhaps he had begun a little too soon. I gave the instructions not to dump from the steamer, because I know it is against all harbor regulations. I knew it was against all harbor regulations to dump ashes in the harbor all over the world, except where you have got a very deep harbor, and sometimes they are very glad of your dumpings.

Q. Suppose you were told that the dredger was actually dredging at that time and between No. 2 buoy and the

41 Fairway buoy, might you not possibly be mistaken as to her position?

A. I think not. I think I am very positive the dredger was to the eastward of the Fairway buoy. I think she was quite a mile east of that buoy.

Q. Why did you tell the first officer that you were in doubt whether it was time to dump your ashes if you were away off here?

A. I did not tell him. Thinking I was in doubt at all, I simply told him I thought he was a little premature in getting them over.

Q. Why did you tell him that if you were pretty well out to sea?

A. I generally give instructions, as a rule, to wait at least an hour from the time of discharging the pilot, and we were nothing like an hour nor a third of it. When we were hailed this dredger was about a cable's length away from us. That would be about one-tenth of a mile. She was about one hundred and seventy yards, roughly speaking.

When he hailed us I gave the chief officer orders to knock off at once. That was done. It is not my custom when I am on board to give the men orders to throw ashes overboard. That was the chief officer's duty. He gives the orders personally to the boatswain. He would communicate with the boatswain and the boat-

swain would give the orders to the men. The other officers don't give those orders. They have nothing to do with the deck at all. The second officer was below at the time. The chief officer was the officer on the watch.

42 I have only brought the scrap log here for my own information. I did not make any entries in my log at this time of where I passed the dredger or the fact that the dredger hailed me; I could not swear to that. I have not got the log here; the log is in London. The company retain the log every voyage. This is simply a scrap log as a memorandum to the officer; the log is made from that.

(Mr. Ralston examines the entry dated 16th of September, 1891, in the engineer's log.)

Redirect examination.

By Mr. KIRLIN:

Q. You stated in your direct examination that you passed Sandy Hook light at 6.45, that the pilot left at seven, and you thought the pilot had been gone about twenty minutes when the men began to shovel over the ashes?

A. That was my impression.

Q. When Mr. Ralston asked you on your cross-examination what time you passed Sandy Hook you said seven o'clock. Do you wish to correct that?

A. I made a mistake then. When I said seven o'clock I meant the time the pilot left. I passed Sandy Hook at 6.45.

Q. Have you referred to the scrap log within a day or so to have those hours in your mind?

A. Yes, sir; I did make a note of it.

Q. When you referred to the scrap log as to the time you passed Sandy Hook you found it to be 6.45 and the time the pilot left seven o'clock?

43 (Mr. Ralston objects to the question unless the log is produced.)

By Mr. RALSTON:

Q. What is your recollection of passing Sandy Hook?

A. Seven o'clock. I may make a mistake in a few minutes and probably I have done so. I have got my log book to prove the exact time to the minute. Exactly where I dropped the pilot I cannot tell you.

By Mr. KIRLIN:

Q. Had you passed the Hook when you dropped the pilot; and, if so, how far?

A. I should reckon that we passed the Hook two to two and a half miles when we dropped the pilot.

Q. If you discharged the pilot at seven o'clock and were two miles

beyond Sandy Hook, you must have passed Sandy Hook in the neighborhood of 6.45 or before that?

A. Yes, sir.

The name of the second officer at that time was J. D. Davis. He was not on deck at any time after we left New York until after this incident of the hail from the dredger. It was his watch off; he was below at the time; I presume he had turned *it*.

JAMES LANG, having been duly sworn, deposes and says:

I — chief engineer of the steamship "Bayonne" on the 16th of September, 1891, and was on watch, beginning, while we were going out through the channel until we were clear of the pilot. I have a record of the time we left the city of New York. This is all I have now (referring to engineer's log).

44 (Mr. Kirlin offered in evidence the entry of the engineer relating to the movements of the vessel under date of 16th September, 1891, in engineer's log.)

I did not make the entries in that book. The engineer made the entries. That is not the officer's log of the vessel.

(Objected to and offer withdrawn.)

Those entries were copied down in the log by me exactly as they are there. I know of my own knowledge those entries are correct. I was there at the time. The engineer was standing by the clock, taking them down on a slate.

(Entries objected to unless made by witness.)

I did not give the figures to the engineer at the time he took them down; he took them off the clock. I was working the engines. I could take the time of the clock and attend to the engine at the same time. The engineer is not on the ship now. He was only one voyage with us. His name is William Hardy. The entries were made by him at the time. He took the figures of the clock as the orders came to the engine-room and while I was working the engine.

(Mr. Kirlin renewed offer of entry of September 16, 1891, in engineer's log.)

(Offer objected to because the entries were not made by the witness and the book is not the official log book of the ship.)

That is the original book on which the entries for the engineer's log are first made. They are put onto a slate in the engine-
45 room and are copied off the slate into this book by the second engineer. That is in his handwriting.

By Mr. RALSTON:

Q. Those entries are made afterwards and copied from the slate?
A. Yes, sir.
Q. Afterwards?
A. Yes, sir.

Q. At the end of the day?
A. Yes, sir.

Mr. KIRLIN: I also offer this log on the further ground that the entry which is now offered was examined by Mr. Ralston during the examination of the master.

Mr. RALSTON: Although I examined it, I asked no questions based upon the log; I simply looked at it.

By Mr. KIRLIN:

Q. What speed were you making between six and seven thirty o'clock a. m. on the 16th of September?

A. I could not say for certain what speed we were making. I could not tell you from recollection. (Referring to log:) They were going sixty-six revolutions a minute; that would be over ten knots. That is full speed.

The entry dated 16th September, which is offered in evidence and objected to, reads as follows:

"Telegraph stand-by, 4.55 a. m; slow at 5.05; full speed, 5.15; stopped, 6.25; full speed, 6.27; slow ahead, 6.53; stopped 6.55 to discharge pilot; full speed ahead, 7 a. m."

46 Q. Was the official log which is filed at home made up from this log?

A. It is a copy of that log; it was made by me; it is about an exact copy of this book.

We did not stop after we discharged the pilot; after we had gone full speed at seven o'clock there were no stops. I don't know where we were at the time.

Cross-examination by Mr. RALSTON:

Q. I understand you to say you ran full speed from six to seven thirty?

A. I didn't say that. I did not mean to say that I did not think that was put down. I cannot recollect the movements without seeing the log.

Q. You did not run full speed from the time you started from the docks at New York until you put the pilot off?

A. (Referring to log.) We went full speed at 5.15; we went ahead slow 5.05; we went full speed at 5.15; we stopped at 6.25; we went full speed ahead again at 6.27; we slowed down at 6.53 and stopped at 6.55 to discharge the pilot. After that we went ahead full speed, and there were no more stops. We were making sixty-six revolutions a minute at the time; that is fully ten knots.

Q. That would vary according to the condition of the weather and tide? You could not tell the actual distance covered?

A. That takes the mean of the revolutions she was making
47 since she left, sixty-six throughout. She had gone 4,760 revolutions.

Q. You cannot tell from those revolutions the actual distance covered by the ship?

A. No, sir; that varies according to the tides and winds and that sort of thing.

I am going away in the ship on Wednesday next.

ROBERT STANTON, having been duly sworn, deposes and says:

I was quartermaster on the "Bayonne" on the 16th of September, 1891. I was on deck as we passed Sandy Hook. I remember seeing the light-ship. I don't know whether it is Sandy Hook light-ship. We passed a light-ship; that was before we discharged the pilot; we passed the light; that was on the starboard side; I didn't know what light that was; I heard somebody say that was Sandy Hook.

Ten *of* fifteen minutes after we passed that light which somebody said was Sandy Hook we discharged the pilot. I put the ladder over myself and give the pilot the boat rope. I took the ladder in and the rope and piled them into the wheel-house.

I remember there being some ashes shoveled over that morning. After I got the boat rope in I saw a man running forward, and I said, "What are you up to now, Jack?" He said, "I have a job dumping ashes." (Objected to.) I saw him shoveling a few ashes over.

Q. How long was it after you had got your rope and ladder in before they began to shovel over the ashes?

48 A. I should say a good quarter of an hour. I could not say how much ashes they had shoveled over. I didn't watch them. I paid no attention to it. Somebody sung out, "Avast heaving those ashes over." I don't know what time in the morning this was exactly. I didn't look at the watch until a good bit afterwards. Afterwards we passed a light-ship on the starboard side. I am going away in the vessel on Wednesday.

Cross-examination.

By Mr. RALSTON:

Q. When you let this pilot down, somebody said they got a job to heave ashes over?

A. No, sir; after the pilot was gone and the ladder was hauled up and the boat rope was put in the wheel-house, I said, "Where are you off, Jack?" and he said, "We have a job to dump ashes." I went to put my ladder in the wheel-house. I did not see the dredge then. I didn't see any dredging-boat. I heard somebody hail, but I paid no attention to it. I don't know how long they had been shoveling those ashes over. It could not have been long before I heard somebody sing out, "Avast heaving those ashes." I don't know how long they had been heaving them. They don't heave ashes overboard without my seeing them. The pilot left the vessel on the starboard side. I was over there getting him off.

Q. Were you on the starboard side of the vessel abaft midships or forward?

A. Just about midships.

Q. You could not see from there what they were doing on the port side of the vessel abaft the midships?

49 A. Yes, sir; off the see-well deck. There are no houses on the deck where I was. After me was the poop and on top of that were the ashes. There was a pretty fair pile of ashes there. I didn't notice the pile of ashes when we first left the dock. I didn't pay much attention to them. I don't know how much ashes they had thrown over. I don't know how long they had been throwing them. I don't know where our vessel was at the time. All I know the pilot was away from us, so I reckon by that the ship was outside the channel. I know they hadn't been throwing ashes before the pilot left. I doubt whether they could have been throwing ashes without my seeing them. I was on deck all the time. The pilot left about ten or fifteen minutes after we left Sandy Hook light. It was fifteen minutes after the pilot left that they threw the ashes over. It might have been about fifteen minutes.

Q. It might have been five minutes, might it not?

A. More than that. I didn't take any time. I am just guessing at it.

Redirect examination.

By Mr. KIRLIN:

Q. Could you see these ashes from where you stood when you were putting the ladder over for the pilot?

A. Yes, sir; I could see them from the main rigging. I had been around on deck before that in the same neighborhood. At the time that we passed this Sandy Hook light I was standing by the boat rope. I was there until the pilot went away. All

50 this time I could see the pile of ashes, but still I was not watching them. I could have seen it if there had been any ashes put over. There was nobody over by the ashes but the cook's mate and a boy. I didn't see anybody until this man that I called Jack went back. I think that was about fifteen minutes after the pilot went off. It was all of that.

DAVID J. DAVIS, having been duly sworn, deposes and says:

I am the present chief officer of the "Bayonne." I was on the "Bayonne" on the 16th of September, 1891, when we left New York harbor coming out through Gedney's channel to the voyage to sea. I came on deck before eight o'clock that morning. At that time the vessel had passed Sandy Hook light-ship. I was not on deck when the pilot was discharged nor when we passed Sandy Hook. I don't know anything about these ashes being put overboard. I don't know anything about having had a hail from a dredging-boat. It was not my watch on deck at the time. I didn't come on deck before eight o'clock that day.

Cross-examination.

By Mr. RALSTON:

Q. Did you come on deck at eight o'clock?

A. I was on deck a little before eight, but I didn't take charge of the bridge before eight o'clock. We had passed Sandy Hook light-ship at the time.

Q. Could you see her?

A. I would not say I could. I could not see her. I came
51 on deck a few minutes before eight. I don't recollect seeing Sandy Hook light at that time. I know we passed her at half past seven.

By Mr. KIRLIN:

Q. Were there any bearings in sight when you came on deck?

A. Navesink. That was in sight.

By Mr. RALSTON:

Q. You passed the light-ship at half past seven?

A. I could not say. I was not on deck.

Q. Why did you say you passed it at half past seven?

A. By reference to the log. The log book said we passed it at half past seven. I have heard the testimony of the captain and other witnesses about the ashes. I know nothing about them.

52 United States District Court, Southern District of New York.

THE UNITED STATES
vs.
THE STEAMSHIP "BAYONNE."

In admiralty. Action for penalty. Dumping ashes from steamer.

Edward Mitchell, U. S. att'y, and Maxwell Evarts, ass't U. S. att'y, for the libellant.

Convers & Kirlin, for the claimant.

Memorandum.

BROWN, *J.*:

1. The weight of evidence is that the ashes were not dumped within the limits prescribed, but to the northward and westward of those limits, not far from the easterly end of Gedney's channel.

2. The evidence further shows that the dumping was directed by the mate of the ship and was for the relief of the ship in the usual course of her navigation. This constituted the use of the ship in the dumping of the ashes within the construction of the act of June 29, 1888 (25 St. L., 209), given by Benedict, J., in the case of The Bombay, 46 Fed. Rep., 665, with which I concur.

Although it seemed to me in the case of The Sadie, 41 Fed. Rep., 823, that no penalties could be recovered depending upon § 1 of the act, for the reason that the supervisors had "not prescribed the

limits within which dumping of deposit was forbidden," in-
53 asmuch as this view was overruled in the circuit, 41 Fed. Rep., 396, and the substitute for the statute adopted by the supervisors was held competent and sufficient, judgment must be rendered for the libellant for the sum of $250, with costs.

December 15, 1892.

54 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 21st day of December, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Addison Brown, district judge.

THE UNITED STATES OF AMERICA
vs.
S. S. "BAYONNE," ETC., ETC.

This cause having been heard on the pleadings and proofs herein and having been argued and submitted by the proctors of the respective parties, and due deliberation being had in the premises, it is now—

Ordered, adjudged, and decreed by the court that The United States of America, the libellant herein, do recover from Bayonne Steamship Co., Ltd., the claimant herein in the above-entitled proceeding, the sum of two hundred and fifty dollars, penalty awarded by the court herein against the said steamship "Bayonne," and the further sum of seventy-seven $\frac{87}{100}$ dollars costs heretofore taxed herein, making in all the sum of three hundred and twenty-seven $\frac{82}{100}$ dollars, and that the said "Bayonne," her engines, etc.,
55 be condemned therefor.

And it is further ordered, adjudged, and decreed that unless the decree herein be satisfied or proceedings herein be stayed within the time and in the manner prescribed by the rules and practice of this court, the stipulators for the costs and for value on the part of the said steamship "Bayonne," her engines, etc., and Bayonne Steamship Co., Ltd, claimants herein, cause the engagements of their stipulations to be fulfilled, or show cause within four days after service upon them or their proctors of a copy of this decree, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels, and lands to enforce the satisfaction of the same.

ADDISON BROWN.

(Endorsed: Decree. Filed Dec. 21, 1892.)

56 United States District Court for the Southern District of New York.

THE UNITED STATES, Libellant,
against
THE STEAMSHIP "BAYONNE," JOHN EDWARD PAYNE, Claimant.

The above-named claimant, John Edward Payne, considering himself aggrieved by the final decree entered in this cause on the 21st day of December, 1892, hereby appeals from said decree to the United States Supreme Court upon the ground that this court was without jurisdiction to make the said decree; and thereupon he prays that his said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree was made may be sent up, duly authenticated, to the United States Supreme Court.

CONVERS & KIRLIN,
Proctors for Claimant, 5 Beekman Street, New York.

Appeal allowed.

ADDISON BROWN, *U. S. D. J.*

(Endorsed: Order allowing appeal. Filed Dec. 31, 1892.)

57 At a term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 31st day of December, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Addison Brown, district judge.

THE UNITED STATES
vs.
THE STEAMSHIP "BAYONNE," JOHN EDWARD PAYNE, Claimant.

It appearing from the records in this case that a stipulation for value in the sum of three thousand dollars, with sureties, and approved by the proctor for the libellant, is on file, and that the decree against which the claimant has appealed is for the sum of three hundred and twenty-seven $\frac{82}{100}$ dollars—

It is ordered, on motion of the appellant, that no further bond on appeal is required, the libellant, however, to have leave to re-examine the sureties on the present stipulation if desired, and if they are found to be unsatisfactory the appellant shall furnish such other sureties thereon as a further order of the court may require.

ADDISON BROWN, *U. S. D. J.*

58 UNITED STATES OF AMERICA, *ss:*

By the Honorable Addison Brown, United States district judge for the southern district of New York, to the United States of America and Edward Mitchell, United States attorney for the southern district of New York, Greeting:

Whereas John Edward Payne, claimant of the steamship "Bayonne," has appealed to the Supreme Court of the United States from a decree rendered in the district court of the United States for the southern district of New York, made in your favor against the steamship "Bayonne," John Edward Payne, claimant, and has filed an assignment of errors and obtained a supersedeas, as required by law, you are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the 15th day of February, 1893, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, on the 17th day of January, 1893.

ADDISON BROWN,
U. S. Dist. Judge.

CONVERS & KIRLIN,
Proctors for Appellant.

(Endorsed: Citation. Filed Jan'y 17, 1893.)

59 United States District Court, Southern District of New York.

THE UNITED STATES, Libellant & Appellee,
against
THE STEAMSHIP "BAYONNE," JOHN EDWARD PAYNE, Claimant & Appellant.

Assignment of Errors.

The learned court below erred in taking jurisdiction of the cause and entering a decree against the steamship "Bayonne" in the following particulars:

First. Because the act in question creates no lien enforce-able *in rem* except as against a boat or vessel used or employed in violating some provision of the act, whereas the "Bayonne" was not used or employed in violating any provision of the act.

Second. Because the act does not create a lien enforce-able against the "Bayonne" *in rem* to recover the penalties to which the person or persons who committed the offense complained of may have been subject under section one of the act.

Third. Because if the act does create a liability on the
60 part of the "Bayonne" for the pecuniary penalty to which the person or persons who committed the offense may be subject under section one of the act, such penalty is not recoverable against the "Bayonne" *in rem* without a previous imposition of the fine upon the offender or offenders.

Fourth. Because the limits within which the deposit of refuse matter was intended to be prohibited have never been drawn by the supervisor of the harbor in accordance with the requirements and specifications of the act or in accordance with law, and therefore the deposit of ashes at the place they were deposited by a person or persons from the deck of the "Bayonne" did not constitute an offense for which the "Bayonne" can be held responsible under the provisions of the act.

CONVERS & KIRLIN,
Proctors for Claimant and Appellant.

Let the within be filed *nunc pro tunc* as of Dec. 31st, 1892.
ADDISON BROWN, *U. S. D. J.*

(Endorsed: Assignment of errors. Filed Jan'y 17, 1893, as of Dec. 31, 1892.)

61 Supreme Court of the United States.

THE UNITED STATES, Libellant and Appellee,
against
THE STEAMSHIP "BAYONNE," ETC.; JOHN EDWARD PAYNE, Claimant and Appellant. } Joinder in Error

And afterwards, to wit, on the 15th day of February, 1893, The United States of America, libellant and appellee, by its proctor, Edward Mitchell, United States attorney for the southern district of New York, comes here into court and says there is no error either in the record of proceedings aforesaid or in rendering the decree aforesaid.

And he prays that the said supreme court before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the decree aforesaid, in form aforesaid granted and rendered, may be in all things affirmed.

EDW'D MITCHELL,
United States Attorney and Proctor for Libellant and Appellee.

(Endorsed: Joinder in error. Filed Jan'y 26, 1893.)

62 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

THE UNITED STATES OF AMERICA, Libellant & Appellee,
vs.
THE STEAMSHIP "BAYONNE," HER ENGINES, &C.; JOHN EDWARD PAYNE, Claimant & Appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 13th day of February, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the said United States the one hundred and seventeenth.

[Seal District Court of the United States, Southern District of N. Y.]

SAM'L H. LYMAN, *Clerk.*

[Endorsed:] District court of the United States for the southern district of New York. The United States of America, lib'l't & appellee, *vs.* The Steamship "Bayonne," her engines, &c.; John Edward Payne, claimant & appellant. Cert'd copy record.

Endorsed on cover: Case No. 15,263. S. New York, D. C. U. S. Term No., 215. The Steamship "Bayonne," her engines, &c., John Edward Payne, claimant, appellant, *vs.* The United States. Filed February 20, 1893.

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JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STEAMSHIP BAYONNE, HER ENGINES, etc.; John Edward Payne, claimant, appellant,
v.
THE UNITED STATES.

No. 215.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS; ALSO BRIEF FOR APPELLEE ON SAID MOTION AND ON CROSS MOTION TO REMAND OR FOR CERTIORARI.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STEAMSHIP BAYONNE, HER ENGINES, etc.; John Edward Payne, claimant, appellant,

v.

THE UNITED STATES.

No. 215.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS.

Comes now the Solicitor General on behalf of the respondent, and moves the court to dismiss the appeal, for the reason that there is no certificate in the record stating any jurisdictional question, and that no appeal lies in this case from the district court to the Supreme Court.

HOLMES CONRAD,
Solicitor General.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STEAMSHIP BAYONNE, HER ENGINES, etc.; John Edward Payne, claimant, appellant,

v.

THE UNITED STATES.

No. 215.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE ON MOTION TO DISMISS AND CROSS MOTION TO REMAND OR FOR CERTIORARI.

This was a libel in admiralty brought by the United States against the steamship *Bayonne*, her engines, etc., to recover a penalty for violation of a certain act of Congress. No question arises concerning the Constitution of the United States or any treaty made under its authority. The assignments of error attempt to raise a question of jurisdiction. (Rec., pp. 34, 35.) There is, however, no certificate of any jurisdictional question to be found in

the record as filed here February 20, 1893. The only action of the trial court which could in any way be construed as a recognition of the claim that there was a jurisdictional question in the case is the order of Judge Brown directing the assignments of error to be filed *nunc pro tunc*.

For this reason the Solicitor General gave due notice of a motion to dismiss the appeal for lack of such certificate, and served therewith upon appellant's attorneys, according to the rule, the following brief:

> It may be doubted whether the question is in the proper sense jurisdictional. Without considering this point, it seems sufficient to call attention to the fact that there is no certificate of a jurisdictional question as required by the statute. (*Maynard* v. *Hecht*, 151 U. S., 324; *Odell* v. *Jacksonville*, 157 U. S., 368; 158 U. S., 456.) The order of Judge Brown directing that the assignment of errors be filed *nunc pro tunc* can not be regarded as a substitute for such certificate within the principle of *Shields* v. *Coleman* (157 U. S., 168, 176) and cases cited.
>
> It is therefore respectfully submitted that the appeal should be dismissed.

Appellant's attorney thereafter served notice of a motion "to remand this cause to the district court for the purpose of having annexed to the record a certificate distinctly certifying to this court the jurisdictional questions involved in this appeal, or in the alternative, for a writ of *certiorari* to have such certificate annexed to the transcript of record."

Among the papers annexed to this motion is a certificate from Judge Brown bearing date November 8, 1895,

and indorsed by him as follows: "Let the within certificate be filed *nunc pro tunc* as of date of January 17, 1893." This *nunc pro tunc* order seems intended to avoid the operation of the rule by which the court's jurisdiction to amend the record in substantial matters ceases at the expiration of the term.

This cause was heard and decided by Judge Addison Brown in the district court of the United States for the southern district of New York at the December term, 1892; the decree was filed December 21, 1892, and the appeal therefrom allowed December 31, 1892. (Rec., pp. 32, 33.) There is a new term in that court on the first Tuesday of every month. (Rev. Stat., § 572.) The term at which the decree was entered expired, therefore, during the first week in January, 1893. On January 17, 1893, Judge Brown authorized the assignment of errors to be filed *nunc pro tunc* as of December 31, 1892 (p. 35). This assignment commenced with the words—

> The learned court below erred *in taking jurisdiction* of the cause and entering a decree against the steamship *Bayonne* in the following particulars:
>
> First. Because the act in question creates no lien enforceable *in rem* except as against a boat or vessel used or employed in violating some provision of the act, *whereas the Bayonne was not used or employed in violating any provision of the act.*
>
> Second. Because the act does not create a lien enforceable against the *Bayonne in rem* to recover the penalties to which the person or persons who committed the offense complained of may have been subject under section 1 of the act.
>
> Third. Because if the act does create a liability on the part of the *Bayonne* for the pecuniary pen-

alty to which the person or persons who committed the offense may be subject under section 1 of the act, such penalty is not recoverable against the *Bayonne in rem* without a previous imposition of the fine upon the offender or offenders.

Fourth. Because the limits within which the deposit of refuse matter was intended to be prohibited have never been drawn by the supervisor of the harbor in accordance with the requirements and specifications of the act or in accordance with law, and therefore the deposit of ashes at the place they were deposited by a person or persons from the deck of the *Bayonne* did not constitute an offense for which the *Bayonne* can be held responsible under the provisions of the act.

The statute under which this libel was filed is the Act of June 29, 1888, chapter 496 (Supp. Rev. Stat., pp. 594, 595). This act prohibits the deposit of refuse, etc., in certain described waters adjacent to the harbor of New York; provides for criminal proceedings against persons violating the law; requires scows, etc., carrying the forbidden matter to apply to the supervisor of the harbor for a permit defining the precise limits within which they may discharge their contents; and provides for a remedy in admiralty by the concluding paragraph of section 4, which is as follows:

> Any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

ARGUMENT.

I. As the record now stands, this appeal must be dismissed for lack of any certificate of jurisdiction. The authorities are hereinbefore set forth.

II. The present certificate of the district judge comes too late. His jurisdiction to grant such a certificate was lost when the term of court expired. (*Odrin* v. *Jacksonville*, 158 U. S., 456.) Even consent of the parties would not confer jurisdiction. (*Virginia* v. *Tennessee*, 158 U. S., 267.) Nothing in the record prior to the expiration of the December term, 1892, indicates any intention in the court to file a certificate. There is no "misprision of the clerk in recording inaccurately or omitting to record an order of the court." (*Michigan Insurance Bank* v. *Eldred*, 143 U. S., 293, 299.) No consent to the filing of such certificate was given by the parties within the term (*Waldron* v. *Waldron*, 156 U. S., 361, 378), nor has the United States ever consented thereto. The following remarks of Mr. Justice Harlan in *Hickman* v. *Fort Scott* (141 U. S., 415, 418) are therefore applicable:

> There is here no clerical mistake. Nothing was omitted from the record of the original action which the court intended to make a matter of record. The case therefore does not come within the rule that a court, after the expiration of the term, may, by an order *nunc pro tunc*, amend the record by inserting what had been omitted by the act of the clerk or of the court.

III. If the court had any jurisdiction to file a certificate *nunc pro tunc*, it has not so far offered to do so. The certificate is now ordered to be filed "as of date of January 17, 1893;" but the term had theretofore expired.

IV. The certificate which has been signed by the learned judge, and is now offered, contains no jurisdictional questions, and therefore presents no case appealing to the favor of this court.

The first question certified is as follows (Motion to remand, or for certiorari, p. 7):

> (1) Whether the said steamship *Bayonne*, by reason of ashes being dumped from her deck by the order of her mate, contrary to the directions of the captain, was "used or employed in violating any provision of this act," within the meaning of the fourth section of said statute, so as to create a lien against the vessel enforceable by proceedings *in rem* to recover the penalty therein and thereby provided.

The second question is as follows (id., p. 8):

> Whether the supervisor of the harbor, by simply prescribing that all refuse, dirt, ashes, and other prohibited matter must be deposited to the eastward and southward of the said Mud Buoy, has prescribed the limits *within which* the deposit of ashes and other prohibited matter is strictly forbidden as required by the above first section of the act, and if so, whether the limits so prescribed are within the "tidal waters of the harbor of New York or its adjacent or tributary waters," so as to make the deposit of the said ashes from the deck of said steamer, under the circumstances stated, and at the place specified, a violation of the statute, subjecting the steamer to the penalty therein provided.

The learned district judge seems to be under the impression that within the meaning of § 5 of the act of March 3, 1891, ch. 517, "the jurisdiction of the court is in issue" upon every final hearing in an admiralty case. It is respectfully submitted that that phrase has a much narrower signification.

A somewhat similar claim was made in *Texas and Pacific Ry.* v. *Saunders* (151 U. S., 105, 109), where the defense was that the defendants "are not liable at suit of plaintiff in this court, and if liable at all, they are only liable upon due intervention of plaintiff at New Orleans." This court held that the plea was not properly a plea to the jurisdiction but a plea in bar, and that it therefore presented no question of jurisdiction within the meaning of the statute.

Analogous questions have come up on appeals in *mandamus* cases arising in the supreme court of the District of Columbia. (*United States* v. *Lynch*, 137 U. S., 280; *South Carolina* v. *Seymour*, 153 U. S., 353.)

Under the act of 1888 (whose constitutionality is not questioned by the appellant) the admiralty court has unquestionably the jurisdiction to consider whether the vessel in question has been used or employed in violating any provision of the act. It thus has jurisdiction of the subject-matter. It also obtained in this case unquestioned jurisdiction of the person. Whether the facts alleged and proved are sufficient to justify the imposition of the penalty was a question properly presented to the district court for decision. Its decision thereon may be erroneous,

but in that case is curable only by an appeal to the circuit court of appeals, whose decision thereon is made final by § 6 of the act of 1891, above referred to.

"The power to hear and determine a cause is jurisdictional." (*United States* v. *Arredondo*, 6 Pet., 691, 709.) "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them." (*Rhode Island* v. *Massachusetts*, 12 Pet., 657, 718.) "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought. * * * Jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it." (*Cooper* v. *Reynolds*, 10 Wall., 308, 316–7.) "Jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case. * * * Jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action." (*Hunt* v. *Hunt*, 72 N. Y., 217, 229–30.)

While the jurisdictional questions referred to in the statute of 1891 have a wider scope than those considered in *habeas corpus* cases, such as *In re Sawyer* (124 U. S., 200, and see *Noble* v. *Union River Logging Co.*, 147 U. S., 165, 175–6), nevertheless we respectfully submit that if the present questions are to be regarded as jurisdictional, then in the words of Mr. Justice Miller

in *Cooper* v. *Reynolds, supra,* at page 320: "Any other error which affected a party's rights could as well be held to affect the jurisdiction."

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

Office Supreme Court, U. S.
FILED.
NOV 11 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1895, NO. 215.

STEAMSHIP "BAYONNE," JOHN EDWARD PAYNE,
Claimant, Appellant,

against

THE UNITED STATES,
Libelants, Appellees

MOTION TO REMAND OR FOR CERTIORARI.

CONVERS & KIRLIN,
Proctors for Appellant.

J. PARKER KIRLIN,
Of Counsel.

Supreme Court of the United States. 1

Steamship "BAYONNE,"
PAYNE,
Claimant, Appellant,

AGAINST

THE UNITED STATES.

October Term, 1895.
No. 215.

Sir,—Please take notice that on November 18, 1895, we 2
shall present to the Supreme Court of the United States a motion, a copy of which is herewith served upon you, to remand this cause to the District Court, for the purpose of having annexed to the record a certificate distinctly certifying to this Court the jurisdictional questions involved in this appeal, or, in the alternative, for a writ of *certiorari* to have such certificate annexed to the transcript of record.

NEW YORK, November 9, 1895.

Yours, &c., 3
CONVERS & KIRLIN,
Proctors for Appellant.

To Honorable HOLMES CONRAD,
Solicitor-General,
Washington, D. C.

4 SUPREME COURT OF THE UNITED STATES.

Steamship "BAYONNE," PAYNE, Claimant, Appellant, AGAINST THE UNITED STATES.	October Term, 1895. No. 215.

And now comes John Edward Payne, claimant of the
5 steamship *Bayonne*, appellant, by J. Parker Kirlin, his advocate, and for the reasons mentioned in the annexed affidavit and certificate moves this Honorable Court, that the above entitled cause be remanded to the United States District Court for the Southern District of New York, for the purpose of having added to the transcript of record a certificate distinctly certifying to the Court the jurisdictional questions involved in this appeal, or, in the alternative, that a *writ of certiorari* issue directing such certificate to be brought to this Court and added to the record, or for such other relief in the premises as he may be entitled to receive.

6 NEW YORK, Nov. 9, 1895.

J. PARKER KIRLIN,
Advocate for the Appellant.

SUPREME COURT OF THE UNITED STATES. 7

Steamship "BAYONNE,"
PAYNE,
Claimant, Appellant,
AGAINST
THE UNITED STATES.

October Term, 1895.
No. 215.

Southern District of New York, ss:

J. PARKER KIRLIN, being duly sworn, says: 8

I am one of the counsel for the appellant herein. This appeal was taken on the 31st day of December, 1892, and the record was prepared and filed in the office of the Clerk of the Supreme Court before any case, decided in the Supreme Court, had laid down any rule as to the form in which the record should be submitted to the Supreme Court, under the fifth section of the Act of March 3, 1891, providing that an appeal should lie to the Supreme Court in any case in which the jurisdiction of the court is in issue, but that, "in such case, the question of jurisdiction alone shall be certified to the Supreme Court from the court below, for decision."

9 In the present case, the appeal was prayed and allowed upon questions of jurisdiction only (Record, p. 33), such questions being defined in the assignment of errors (Record, p. 34). The citation directed to the libelant was issued after the filing of said assignment of errors (Record, p. 34), which the Court ordered to be filed *nunc pro tunc* as of the date of the allowance of the appeal (Record, p. 35); and the joinder in error,

filed by the United States, prayed that the Court would proceed to examine the matters thus assigned for error (Record, p. 35). The question as to the form of the record arose at the time of the allowance of the appeal and was discussed, and the District Judge was of opinion that as the assignment of errors raised only questions of jurisdiction, and the appeal was allowed only on such questions, it would be a compliance with the statute to have the Clerk of the Court certify the record with the appeal thus limited solely to questions of jurisdiction; and this view appears to counsel to be sustained by the subsequent decision of *Shields* v. *Coleman*, 157 U. S., 168. As, however, the Solicitor-General has presented a motion to dismiss the appeal solely upon the ground that the record does not contain such a certificate as the statute contemplates, and as the learned District Judge has, in fact, prepared such a certificate, a certified copy of which is hereto annexed, appellants respectfully pray that said cause may be remanded to the District Court for the purpose of having such certificate annexed to the record, or, in the alternative, that the Court will issue a *writ of certiorari* directing that said certificate be brought to this court and here filed as a part of the transcript of record on this appeal.

J. PARKER KIRLIN.

Sworn to before me this 9th day of November, 1895.

FREDERICK GREEN,
Notary Public,
N. Y. Co.

[SEAL.]

To the Honorable the Justices of the Supreme Court 13
of the United States:

The Steamship "Bayonne,"
her engines, &c.,
John Edward Payne,
Claimant, Appellant,

vs.

The United States.

14

United States of America,
Southern District of New York, } ss.:

I hereby certify my decision in this cause upon the questions of fact and of law presented to me for determination in this case, and the questions of jurisdiction involved on this appeal, as follows:

1st. I find that certain ashes were dumped from the deck of this vessel into tidal waters not to the south and east of a certain white spar buoy known as the Mud Buoy, to the southward and eastward of which the Supervisor of the Harbor of New York, assuming to act under and pursuant to an act of Congress, entitled: "An Act to pre- 15
vent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping or otherwise," &c., approved June 29, 1888, directed that all ashes, garbage, &c., must be dumped, but, on the contrary, such ashes were dumped to the southward and westward of said Mud Buoy, at or near the mouth of Gedney's Channel, at a point more than three miles from Sandy Hook and more than three miles from Coney Island and the shore of Long Island.

16 The said Mud Buoy selected by the Supervisor of the harbor as the point to the eastward and southward of which such deposits should be made, is located as follows: Stone Beacon Light bearing west, three-fourths south, distant 4½ miles; West Brighton Observatory bearing northwest by north, one-half north, distant 3 miles; Sandy Hook Lighthouse bearing southwest, distant 6 miles; Scotland Lightship bearing south, one-half west, distant 6¼ miles; Sandy Hook Light bearing southwest, distant 7¾ miles.

I further find that the Supervisor of the Harbor has not drawn any other limits under the act than those above
17 stated, and has not expressly forbidden the deposit of ashes or other matter at other places than to the eastward and southward of the said Mud Buoy.

2d. The dumping of the ashes by the direction of the mate as aforesaid, was for the relief of the ship in the usual course of her navigation, although contrary to the orders of the master, that ashes should not be put over until the vessel was an hour at sea after the pilot left her, the vessel being at the time about twenty minutes beyond Sandy Hook, and this constituted the use and employment of the vessel in violating the act within the meaning of an act of Congress, entitled "An Act to prevent
18 obstructive and injurious deposits within the Harbor and adjacent waters of New York City, by dumping or otherwise, and to punish and prevent such offences," approved June 29, 1888 (25 Statutes at Large, p. 209).

3d. By force of the aforesaid statute in such case provided, and by force of the definition of the limits by the Supervisor of the Harbor of New York, as the place where the deposit of such ashes must take place, the said steamship *Bayonne* became and was adjudged liable to a penalty of $250 for dumping the said ashes to the south-

ward and westward of said Mud Buoy, for which sum, 19
with costs, amounting in all to $327, a final decree was entered in favor of the United States.

The claimant of the steamship *Bayonne* thereupon appealed to the United States Supreme Court, and his said appeal was by me allowed on the 17th day of January, 1893, upon questions of jurisdiction, which were argued before me in the District Court and specified in an assignment of errors, the substance of which was stated to me at the time of the allowance of the appeal and subsequently by me permitted to be filed *nunc pro tunc* as of the date of the allowance of the appeal, namely, December 31, 1892, and on the 17th of January, 1893, after the 20
filing of the said assignment of errors, a citation was by me issued to the libelants, directing them to appear to the said appeal at the City of Washington on the 15th day of February, 1893, to do and receive what might appertain to justice to be done in the premises.

Afterwards, and on January 26th, the United States Attorney filed in the office of the Clerk of this Court a joinder in error, praying that the Supreme Court would proceed to examine "the matters aforesaid above assigned for error," &c.

4th. I further certify that the questions of jurisdiction 21
involved in the said appeal of the claimant are:

(1.) Whether the said steamship *Bayonne*, by reason of ashes being dumped from her deck by the order of her mate, contrary to the directions of the captain, was "used or employed in violating any provision of this act," within the meaning of the Fourth Section of said statute, so as to create a lien against the vessel enforceable by proceedings *in rem* to recover the penalty therein and thereby provided.

22 (2.) The first section of the statute provides as follows:

"*Be it enacted* &c., That the placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the Supervisor of the Harbor, is hereby strictly forbidden."

A further question of jurisdiction involved in the claimant's appeal is, whether the Supervisor of the Harbor, by
23 simply prescribing that all refuse, dirt, ashes and other prohibited matter must be deposited to the eastward and southward of the said Mud Buoy, has prescribed the limits *within which* the deposit of ashes and other prohibited matter is strictly forbidden as required by the above first section of the act, and if so, whether the limits so prescribed are within the "tidal waters of the Harbor of New York, or its adjacent or tributary waters," so as to make the deposit of the said ashes from the deck of said steamer, under the circumstances stated, and at the place specified, a violation of the statute, subjecting the steamer to the penalty therein provided.

24 All of which is respectfully submitted to the United States Supreme Court for its consideration.

ADDISON BROWN,
United States District Judge,
Southern District New York.

(Endorsed)—37-401.—Steamer *Bayonne*, Payne, Claimant-Appellant *vs.* United States.—Certificate.—Let the within certificate be filed *nunc pro tunc* as of date of January 17, 1893.—N. Y., Nov. 8/95.—Addison Brown.—Received and filed as per above mandate, Nov. 8/95.

UNITED STATES OF AMERICA, } ss.: 25
Southern District of New York, }

I, SAMUEL H. LYMAN, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the writing annexed to this certificate has been compared by me with its original on file and remaining of record in my office; that it is a correct transcript therefrom and of the whole of the said original.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this ninth day of November, in the year of our Lord one thousand 26 eight hundred and ninety-five, and of the independence of the said United States the one hundred and twentieth.

SAML. H. LYMAN,
Clerk.

[SEAL.]

Office Supreme Court U. S.
FILED.
NOV 18 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895—No. 215.

STEAMSHIP "BAYONNE," JOHN EDWARD PAYNE,
Claimant, Appellant,

AGAINST

THE UNITED STATES.

BRIEF FOR THE "BAYONNE" IN OPPOSITION TO MOTION TO DISMISS APPEAL, AND IN SUPPORT OF APPELLANT'S MOTION TO REMAND FOR ADDITIONAL CERTIFICATE, IF REQUIRED, OR FOR A CERTIORARI REQUIRING SUCH CERTIFICATE TO BE BROUGHT UP.

CONVERS & KIRLIN,
Proctors for Appellant.

J. PARKER KIRLIN,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 215.

The Steamship "BAYONNE," her engines, &c.

JOHN EDWARD PAYNE, Claimant, Appellant,

AGAINST

THE UNITED STATES.

Brief for the *Bayonne* in opposition to the motion of the United States to dismiss the appeal, and in support of the motion of the appellant to remand the cause for an additional certificate if required showing jurisdictional points, or for a writ of certiorari requiring such certificate to be brought to this Court, and here annexed to the record.

Statement.

This is a libel filed by the United States in the District Court for the Southern District of New York, to recover a penalty from the steamship *Bayonne*, under "An Act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping

or otherwise, &c.," approved June 29, 1888 (25 Statutes at Large, page 209).

The first section of said Act provides as follows:

"*Be it enacted, &c.*, That the placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, *in the tidal waters of the harbor of New York*, or its adjacent or tributary waters, or in those of Long Island Sound, *within the limits which shall be prescribed* by the Supervisor of the Harbor, is hereby strictly forbidden."

This section further provides:

"That every such act is made a misdemeanor, and every person engaged in, or who shall aid, abet, authorize or instigate a violation of this section, shall upon conviction, be punishable by fine or imprisonment, or both, such fine not to be less than $250, nor more than $2,500, and the imprisonment to be not less than thirty days, nor more than one year, either or both united, in the discretion of the Court, one-half of the fine to be paid to the informer."

The Supervisor of the Harbor, assuming to act under and by virtue of the said statute, has directed that prohibited matter must be dumped "to the south and east of a certain white spar buoy, known as the 'Mud Buoy,' situated three miles south of Coney Island, located as follows:

"Stone Beacon Light, bearing west 3/4 south, distant four and a half miles, West Brighton Observatory, bearing northwest by north 1/2 north, distant three and a half miles, Sandy Hook Light House, bearing southwest, distant six miles, Scotland Light Ship, bearing south 1/2 west, distant six and a half miles, Sandy Hook Light,

bearing south southwest, distant seven and three-quarter miles" (Libel, Record, page 2).

It will be seen at once that these "limits" are not in the tidal waters of New York Harbor, but are far out to sea.

No other limits have been defined by the Supervisor of the Harbor than as above stated (Judge Brown's Certificate, Record, Motion to Remand, fol. 16).

This regulation, in effect, amounts to drawing a line straight to the eastward from this mud buoy, which is in the Atlantic Ocean, about six or seven miles from Sandy Hook and three miles from Coney Island, and another line at right angles to it, straight to the south, in effect setting aside one-quarter of the earth's surface as a place for deposit of all refuse matter, impliedly, but not expressly, prohibiting the deposit anywhere on the other three-quarters of the earth's surface.

Judge Brown, in the case of the *United States* v. *The Sadie*, 41 Fed., 823, in a carefully considered opinion, held that such vague and indefinite lines drawn wholly outside the waters in which the statute directed the limits should be drawn, was ineffective, and not a compliance with the statute, and that deposit of refuse matter otherwise than to the eastward and southward of this buoy would not, therefore, constitute a criminal offense for which a penalty or imprisonment would follow.

The third paragraph of Section 4 of the Act, above referred to, provides as follows:

"Any boat or vessel *used or employed in violating* any provision of this Act, shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any District Court of the United States having jurisdiction thereof."

A small quantity of ashes was dumped from the deck of the *Bayonne* by order of her mate, contrary to the orders

of her captain, to the westward and southward of the mud buoy, but at or near the mouth of Gedney's Channel, more than three miles from Sandy Hook, and more than three miles from Coney Island and the shore of Long Island. (Motion to remand, fols. 14, 15, 17.)

The decision of the District Judge, in the case of the *Sadie*, having been overruled on appeal (41 Fed., 396) he was constrained in the present case to find that an offense against the statute was committed (Record, pp. 31, 32) and being of opinion, contrary to the decision of Judge GREEN, of the District of New Jersey, in the case of the *Anjerhead*, 46 Fed., 664, that dumping under the circumstances mentioned constituted "use" and "employment" of the vessel "in violating" the act, within the fourth section, he adjudged a penalty for which a decree was entered (Record, p. 32).

The *Bayonne* thereupon prayed an appeal to this Court, *upon questions of jurisdiction only*, under and pursuant to the fifth section of the Act of March 3, 1891, providing that an appeal should lie to this Court, if any case in which the jurisdiction of the Court below is in issue, and the District Judge allowed the appeal on December 21, 1892. The prayer for said appeal, which was granted as above, recited that it was taken:

"Upon the ground that this (District) Court was without jurisdiction to make the said decree," &c.

It was endorsed: "Appeal Allowed, Addison Brown, *U. S. D. J.*"

The substance of the grounds of the appeal was stated to the Court at that time (Judge's Certificate, Motion to Remand, fol. 19).

The assignment of errors was subsequently drawn up, stating in detail the points of jurisdiction involved (Record, pp. 34, 35). These were in effect:

(1.) That the vessel was not "used or employed *in violating* the act," and that accordingly she did not become liable as a *res* for the penalty, under the fourth section of the act, which creates a lien on the vessel for the penalty only when it is "used or employed in violating any provision of this act;" and

(2.) That the limits within which the deposit of refuse matter was intended by the statute to be prohibited have never been drawn by the Supervisor of the Harbor, in accordance with the requirements and specifications of the act, or in accordance with law, and therefore the deposit of ashes where they were deposited did not constitute an offense for which the steamer could be held responsible under the statute.

The District Judge, on December 31st, endorsed this assignment of errors, as follows:

"Let the within be filed *nunc pro tunc*, as of December 31, 1892 (date of allowance of appeal). Addison Brown, *U. S. D. J.*"

On the 17th of January, 1893, Judge Brown issued a citation reciting that the claimant of the steamship had appealed and filed an assignment of errors and obtained a *supersedeas*, and requiring the Government to appear before this Court on the 15th of February, 1893, in answer to the said appeal (Record, p. 34).

On the 26th of January, 1893, the United States Attorney for the District of New York, filed a joinder in error, praying this Court to proceed "to examine as well the record and proceedings aforesaid, as the matters aforesaid, above assigned for error, &c." (p. 35).

This case having been numbered 215 of the calender of the October Term for 1895, and the record duly printed, the Solicitor-General has filed a motion to dismiss the appeal "for the reason that there is no certificate in the

record stating any jurisdictional question, and that no appeal lies in this case from the District Court to the Supreme Court."

The appellant opposes the motion to dismiss, upon the ground that the questions involved in this appeal are questions of jurisdiction only, and are sufficiently certified to the Court on the record as it now stands, but in the alternative, and by agreement, the appellant at the same time, presents his motion to remand the cause to the District Court, for the purpose of having added to the transcript of record, if required, a certificate on file in that Court, a certified copy of which is annexed to the motion (pp. 5–8), and is as follows:

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Steamship "BAYONNE," her engines, &c.,
JOHN EDWARD PAYNE,
Claimant, Appellant,

vs.

THE UNITED STATES.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I hereby certify my decision in this cause upon the questions of fact and of law presented to me for determination in this case, and the questions of jurisdiction involved on this appeal, as follows:

1st. I find that certain ashes were dumped from the deck of this vessel into tidal waters not to the south and east of a certain white spar buoy known as the Mud Buoy,

to the southward and eastward of which the Supervisor of the Harbor of New York, assuming to act under and pursuant to an act of Congress, entitled: "An Act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping or otherwise," &c., approved June 29, 1888, directed that all ashes, garbage, &c., must be dumped, but, on the contrary, such ashes were dumped to the southward and westward of said Mud Buoy, at or near the mouth of Gedney's Channel, at a point more than three miles from Sandy Hook and more than three miles from Coney Island and the shore of Long Island.

The said Mud Buoy selected by the Supervisor of the Harbor as the point to the eastward and southward of which such deposits should be made, is located as follows: Stone Beacon Light bearing west, three-fourths south, distant 4½ miles; West Brighton Observatory bearing northwest by north, one-half north, distant 3 miles; Sandy Hook Lighthouse bearing southwest, distant 6 miles; Scotland Lightship bearing south, one-half west, distant 6¼ miles; Sandy Hook Light bearing southwest, distant 7⅞ miles.

I further find that the Supervisor of the Harbor has not drawn any other limits under the act than those above stated, and has not expressly forbidden the deposit of ashes or other matter at other places than to the eastward and southward of the said Mud Buoy.

2d. The dumping of the ashes by the direction of the mate as aforesaid, was for the relief of the ship in the usual course of her navigation, although contrary to the orders of the master, that ashes should not be put over until the vessel was an hour at sea after the pilot left her, the vessel being at the time about twenty minutes beyond Sandy Hook, and this constituted the use and employment of the vessel in violating the act within the meaning of an act of Congress, entitled "An Act to prevent obstructive and injurious deposits within the Harbor and adjacent waters of New York City, by dumping or otherwise, and to punish and prevent such offences," approved June 29, 1888 (25 Statutes at Large, p. 209).

3d. By force of the aforesaid statute in such case provided and by force of the definition of the limits by the Supervisor of the Harbor of New York, as the place where the deposit of such ashes must take place, the said steamship *Bayonne* became and was adjudged liable to a penalty of $250 for dumping the said ashes to the southward and westward of said Mud Buoy, for which sum, with costs, amounting in all to $327, a final decree was entered in favor of the United States.

The claimant of the steamship *Bayonne* thereupon appealed to the United States Supreme Court, and his said appeal was by me allowed on the 17th day of January, 1893, upon questions of jurisdiction, which were argued before me in the District Court and specified in an assignment of errors, the substance of which was stated to me at the time of the allowance of the appeal and subsequently by me permitted to be filed *nunc pro tunc* as of the date of the allowance of the appeal, namely, December 31, 1892, and on the 17th of January, 1893, after the filing of the said assignment of errors, a citation was by me issued to the libelants, directing them to appear to the said appeal at the City of Washington on the 15th day of February, 1893, to do and receive what might appertain to justice to be done in the premises.

Afterwards, and on January 26th, the United States Attorney filed in the office of the Clerk of this Court a joinder in error, praying that the Supreme Court would proceed to examine "the matters aforesaid above assigned for error," &c.

4th. I further certify that the questions of jurisdiction involved in the said appeal of the claimant are:

(1.) Whether the said steamship *Bayonne*, by reason of ashes being dumped from her deck by the order of her mate, contrary to the directions of the captain, was "used or employed in violating any provision of this act," within the meaning of the Fourth Section of said statute, so as to create a lien against the vessel enforceable by proceedings *in rem* to recover the penalty therein and thereby provided.

(2.) The first section of the statute provides as follows:

"*Be it enacted*, &c., That the placing, discharging or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the Supervisor of the Harbor, is hereby strictly forbidden."

A further question of jurisdiction involved in the claimant's appeal is, whether the Supervisor of the Harbor, by simply prescribing that all refuse, dirt, ashes and other prohibited matter must be deposited to the eastward and southward of the said Mud Buoy, has prescribed the limits *within which* the deposit of ashes and other prohibited matter is strictly forbidden as required by the above first section of the act, and if so, whether the limits so prescribed are within the "tidal waters of the Harbor of New York, or its adjacent or tributary waters," so as to make the deposit of the said ashes from the deck of said steamer, under the circumstances stated, and at the place specified, a violation of the statute, subjecting the steamer to the penalty therein provided.

All of which is respectfully submitted to the United States Supreme Court for its consideration.

ADDISON BROWN,
United States District Judge,
Southern District New York.

(Endorsed)—37-401.—Steamer *Bayonne*, Payne, Claimant-Appellant, *vs.* United States.—Certificate.—Let the within certificate be filed *nunc pro tunc* as of date of January 17, 1893.—N. Y., Nov. 8/95.—Addison Brown.—Received and filed as per above mandate, Nov. 8/95.

POINTS.

I.

The questions involved in this appeal are jurisdictional within the meaning of the statute.

One of the grounds of the motion to dismiss is "that no appeal lies in this case from the District Court to the Supreme Court." This raises an inquiry whether the grounds of the appeal are in a proper sense jurisdictional.

1. If the Supervisor of the Harbor of New York has not drawn the limits *within* which the deposit of prohibited matter is by the act itself forbidden, or has made the limits more extensive than the statute contemplates, or has drawn his lines wholly *outside* the waters *within* which the statute said they should be drawn, then the act is still inoperative and creates no liability for depositing the ashes at the place they were put overboard in this case; and although the Court had jurisdiction of the parties, it had no jurisdiction to enter the decree, because the act complained of constituted no punishable offense.

2. A maritime lien lies necessarily at the basis of every libel *in rem*. Although the person who put the ashes over or ordered them over, would be liable individually to the penalties prescribed under the first section of the act, no lien against the vessel for such penalty arose unless it was "used or employed in *violating* any provision of this act," in an *active* sense, *i. e.*, for the purpose and with the design of violating the act. If the act complained of did not constitute use and employment of the ship in "violating" the act (but only a mere use of the ship by an individual in the violation *by him* of the act), no lien enforceable *in rem* arose, and the Court, though

having jurisdiction of the ship, was without jurisdiction to enter the decree, because of the absence of a lien.

The exact point under the same statute was before Judge GREEN, of New Jersey, where the question of jurisdiction was raised by an exception to the libel in the *Aujer Head*, 46 Fed. Rep., p. 664. His decision was as follows:

"The first exception taken by the claimants to the libel is well founded, and is sustained. The allegation of the libel is that, while the steamship *Aujer Head* was in New York harbor, some one on board of her did deposit in the tidal waters of the harbor ashes and cinders, contrary to the statute in such case made and provided. The facts, as admitted, are that an employee on board the steamship did throw overboard a single scuttle of ashes at the place named. Such employee was undoubtedly technically guilty of violating the statute. But these proceedings are not against him but are brought against the steamship, being based upon the last clause of Section 4 of the statute referred to in the libel. That clause reads as follows: 'Any boat or vessel used or employed in violating any provisions of this act shall be liable,' &c. The emphatic words in this clause are 'used' and 'employed.' Practically they are synonymous, and they mean 'to make use of,' 'to put to a purpose.' The clause in question, then, renders every boat or vessel 'put to the purpose' of violating the provisions of this statute liable to the penalties. It is quite evident that the *Aujer Head* was not so engaged in such violation. To be put to such or to any purpose necessarily requires antecedent determination on the part of her master or owners, or of some one with sufficient authority that she shall perform such purpose. A vessel can only be used or employed by or with the consent of the person who has the legal right to use and employ. There is no pretense that there was any such use or employment in this case."

3. In the certificate prepared and filed *nunc pro tunc* by the District Judge, annexed to appellant's motion to

remand, both of these points are stated by the Court below as jurisdictional questions (Motion to Remand, fols. 21–23).

II.

The questions of jurisdiction are certified to this Court from the Court below, within the fair intendment of the act.

The statute does not in terms direct that the *Judge* below shall make a distinct certificate to this Court. It says: "The question of jurisdiction alone shall be certified to the Supreme Court *from* the Court below," &c., not *by* the Court below.

This provision ought to be interpreted as liberally as possible by the Court in furtherance of justice. If the Judge below, for example, should consider a given point was not jurisdictional, or decline to give a distinct and separate certificate, prejudice or inconvenience might follow to clients on a strict construction of the act (*In re Lehigh*, 156 U. S., 322).

In the present case, the moving affidavit (fol. 10) shows that at the time the appeal was prayed and allowed, before any rule on the subject had been announced by this Court, the Judge below and counsel, wishful to proceed right, supposed the prayer and allowance of the appeal upon questions of jurisdiction only (Record, p. 33), which were defined in the assignment of errors, duly endorsed by the Judge and ordered to be filed (Record, p. 35), such errors being of law only, constituted a sufficient certificate within the meaning of the statute. The same strictness of practice in first cases under a new procedure should not be exacted, that is, required after the proper practice

has been announced by decisions of this Court, provided, of course, that enough appears in the record to show the Court below intended to send up questions of jurisdiction clearly defined, and such questions only.

The case comes fairly within the rule of *Shields* v. *Coleman*, 157 U. S., 168.

In that case, which was also one of the early appeals under the act, there was no separate certificate.

The petition for an appeal there "prays an order granting an appeal from said final decree and interlocutory orders, taking and exercising jurisdiction as aforesaid, to the Supreme Court of the United States, as authorized by Section 5 of the Act of Congress," &c.

The Judge endorsed the prayer: "This appeal is granted solely upon the question of jurisdiction," and made an order that parts of the record should be omitted.

In the case at bar the appellant "hereby appeals from said decree upon the ground that this (District) Court was without jurisdiction to make the said decree," &c.

It was endorsed:

"Appeal allowed.—Addison Brown, *U. S. D. J.*" (Record, p. 35.)

An assignment of errors was then drawn up, specifying the questions of jurisdiction distinctly and clearly.

This was endorsed:

"Let the within be filed *nunc pro tunc* as of Dec. 31, 1892 —Addison Brown, *U. S. D. J.*" (Record, p. 35.)

December 31, 1892, was the date on which the appeal was allowed.

The substantial similarity between the cases, as regards the manner in which the jurisdictional point was presented, is thus apparent. The differences appear to be that in *Shields* v. *Coleman*, the Court in the order allowing the appeal, reserved to itself the privilege of directing what parts of the record should go up, while

in the present case, the entire record, being short, was certified up, and that, in the present case, the jurisdictional points were particularly set forth in the assignment of errors which bore the Judge's endorsement and direction to file, in addition to his order allowing the appeal on jurisdictional points only.

Mr. Justice BREWER, in *Shields* v. *Coleman* (p. 176), said:

"It is not necessary that the word certify be formally used; it is sufficient if there is a plain declaration that the single matter which is by the record sent up to this Court for decision, is a question of jurisdiction, and the precise question clearly, fully and separately stated."

In the case of *Maynard* vs. *Hecht*, 151 U. S., 324, (at p. 328), Mr. Chief Justice FULLER, after stating that the petition for a writ of error and the assignment raised the question that the matter in dispute in the cause did not exceed, exclusive of interest and costs, the sum of $2,000, pointed out that "the trial Judge made no endorsement thereon."

In the present case, the District Judge endorsed upon the assignment of error: "Let the within be filed *nunc pro tunc* as of December 31, 1892. Addison Brown, U. S. D. J." (Record, p. 35). And upon the prayer for the appeal, which recited that the claimant appealed "upon the ground that this Court was without jurisdiction to make the said decree," he endorsed: "Appeal allowed. Addison Brown, U. S. D. J." (*Record, p.* 33).

In *Re Lehigh Mining Co.*, 156 U. S., 322, there was no separate certificate of the jurisdictional point involved.

The action was dismissed below for want of jurisdiction. The plaintiff excepted to the dismissal, and afterwards

prayed for a writ of error, to this Court, upon the question of jurisdiction.

The bill of exceptions declared that the Court "held that the Court did not have jurisdiction of this suit, and ordered the same to be dismissed, to which opinion and action of the Court the plaintiff did then and there except." The plaintiff thereupon prayed for a writ of error to said judgment and proceedings to the Supreme Court "upon the said question of jurisdiction." The Judge endorsed the application: "It is ordered and considered by this Court that said writ of error be allowed and awarded *as prayed for*."

An application for an order certifying the question of jurisdiction to this Court, pursuant to Section 5 of the Judiciary Act of March 3, 1891, having been denied, the plaintiff moved in this Court for leave to file a petition for a *writ of mandamus*, requiring the Court below to certify the question of jurisdiction. The application was denied upon the ground that the requisition of the statute was sufficiently complied with by the allowance of the appeal prayed for.

It would appear, from comparision of the records of these cases, that the jurisdictional points appear more clearly and are more dictinctly defined in the case at bar, than they were in the case of *Re Lehigh*, and that, accordingly, the motion to dismiss, for want of a suitable certificate, should be denied.

III.

If the jurisdictional questions are not certified from the Court below, as required by the statute, the Court may grant appellant's motion to remand for correction of the record by addition of the separate certificate on file in the District Court (Motion Papers, pp. 5-9), or for a *certiorari* to have the certificate brought up to this Court and here annexed to the record.

Such a motion does not appear to have been made in any of the cases so far decided under the statute, where the record was defective for want of a proper and separate certificate. In the present case the District Judge has filed in his Court a full certificate, in the form approved by recent decisions of this Court.

The filing of the certificate *nunc pro tunc* was within the power of the Court.

Chicago v. *Bigelow*, 19 Lawyers' Co-op. Reports, 257.

Where the jurisdiction of the Circuit Court depends on citizenship of the parties, and the record on appeal does not show citizenship, this Court would be without jurisdiction; yet in such case it is proper practice to remand for further proceedings to show citizenship.

Everhart v. *Huntsville College*, 120 U. S., 223.

That case in principle is very like the present, and no good reason appears, it is submitted, for any difference in the practice.

Motions to remand for correction of record in essential matters are favored and granted when made in due season.

The *Harrison*, 1 Wheat., 298.
Ballard v. *Searls*, 130 U. S., 50.
See also *Northern Pacific* v. *Walker*, 148 U. S., 391.

Or a *certiorari* may be granted to bring up the omitted certificate.

Redfield v. Parks, 130 U. S., 623.

Under the previous practice, when the statutes required an assignment of errors to be filed before a writ of error should be allowed (R. S., § 997), and an appeal bond as condition of an appeal (R. S. 1,000), and an allowance of the appeal by the Judge below, it was usual to allow errors or omissions in such matters to be corrected or supplied by remand of the cause, or otherwise.

Chicago v. *Bigelow* (*supra*).
Gumbel v. *Pitkin*, 113 U. S., 546.
Anson v. *Blue Ridge Co.*, 23 How., 1.
O'Reilly v. *Edrington*, 96 U. S., 724.

IV.

The motion to dismiss should be denied, or in the alternative appellant's motion to remand for correction of the record, or for a *certiorari* to bring up the certificate on file in the District Court, should be granted.

November 15, 1895.

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